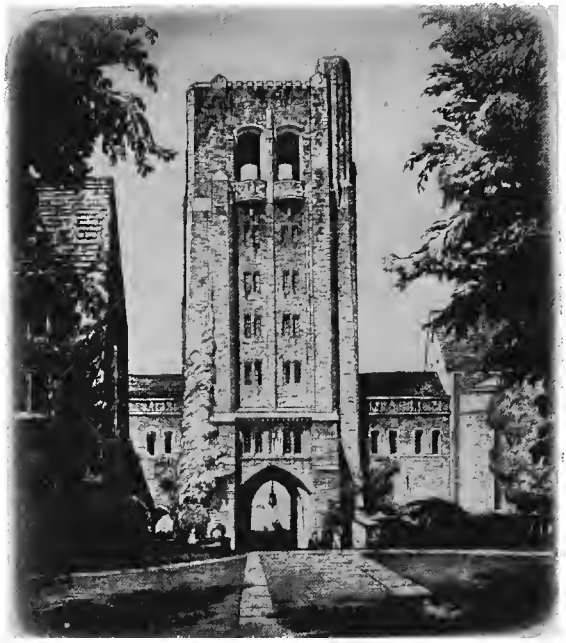

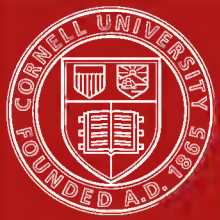

THE PRINCIPLES OF EQUITY

THE

PRINCIPLES OF EQUITY

INTENDED FOR

THE USE OF STUDENTS—AND OF PRACTITIONERS

BY

EDMUND H. T. SNELL

OF THE MIDDLE TEMPLE, ESQUIRE, BARRISTER-AT-LAW

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BY

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PREFACE

TO THE SIXTEENTH EDITION.

This Sixteenth Edition of "Snell's Equity" is the thirteenth edition of that work which has been published since 1875, when law and equity were for the first time fused effectively under one and the same juridical administration; and it was my chief duty as Editor, in 1875, to suggest, how the fusion would operate as regards the different subject-matters comprised in the Book; and it has been my endeavour, continuously in all the twelve successive editions which I have edited since 1875, to further show (by statement and illustration), how the fusion was operating and has operated.

The present edition does not materially differ from its predecessors,—excepting that it incorporates, of course, all the new relevant decisions and also all the new relevant statutes since the year 1907.

I have studied to effect, where it was possible to do so, various simplifications in my exposition of "The Principles"; and I have also effected certain condensations, where condensation was consistent with completeness. But it would have been an ill service to every one (the student included), if I had sacrificed a real completeness to a spurious simplicity.

A. BROWN.

3, STONE BUILDINGS,
LINCOLN'S INN,
December, 1911.

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ADDENDA.

P. 80,—footnote (*n*),—*Green* v. *Meinall* is now reported in 1911, 2 Ch. 275.

P. 121,—in footnote (*e*), add a reference to *In re Pope's Contract*, 1911, 2 Ch. 442.

P. 141,—footnote (*h*),—*In re Devereux, Toovey* v. *P. T.*, is now reported in 105 L. T. 407.

P. 208,—footnote (*g*),—*In re James, James* v. *James*, is now reported in 1911, 2 Ch. 348.

P. 210,—footnote (*u*),—*In re Thomas, Bartley* v. *Thomas*, is now reported in 1911, 2 Ch. 389.

P. 283,—in footnote (*p*), add a reference to *Manks* v. *Whiteley*, 1911, 2 Ch. 448.

P. 289,—footnote (*s*),—*In re Bladon, Dandy* v. *Porter*, is now reported in 1911, 2 Ch. 350.

P. 439,—in footnote (*s*), add a reference to *Stirling* v. *Burdett*, 1911, 2 Ch. 418.

P. 548,—The paragraph ending with the words "undue influence (*u*), "—or for illegality (*x*)," near top of page, is to be continued as follows:—"And (*e.g.*) in *Woodhouse* v. *Shelley* (2 Atk. "535), where the plaintiff (who was an impulsive young "female and the child of wealthy parents) gave to the defen- "dant her fiancé (who was a detrimental and a schemer) her "bond in 2,000*l.*, conditioned for payment to him of the "sum of 1,000*l.* in cash, in case she did not marry him "before a certain date (which was specified in the condition), "—the Court ordered the peremptory delivery up and "cancellation of the bond."

MEMORANDUM.

By the Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), which received the Royal assent on the 16th December, 1911, and which came into force the 1st January, 1912, the following material changes have been made:—

Pages 6 and 253.—By sect. 3, the mortgagor in possession may now accept the surrender,—provided it be for the purpose of his granting a new lease under the Conveyancing Act, 1881.

Page 63.—By sect. 10, the power of sale in trustees now continues (for the purchaser's protection) until the trustees have actually conveyed the property to their *cestuis que trustent*.

Page 99.—By sect. 12, only the proving executors need now execute the assignment,—or the conveyance,—to their *cestuis que trustent*.

Pages 139, 140.—By sect. 8, the legal personal representatives of the deceased trustee (sole or last surviving) may now execute the trust, until new trustees are appointed.

Pages 128, 236, 292, and 341.—By sect. 7, the 39th section of the Conveyancing Act, 1881, is repealed (and, incidentally, Malins' Act is also repealed),—and the like powers are now made exerciseable under this Act,—the powers now extending even to a married woman's interests under her own marriage settlement.

Pages 285, 286.—By sect. 9, the mortgagee, if a trustee, may now exercise the power of sale, although he has become entitled by foreclosure absolute,—equally as when his title is become absolute by adverse possession.

Page 287.—By sect. 5, the purchaser from the selling mortgagee is not now concerned at all, whether the notice has been given or not.

Page 288.—By sect. 4, certain useful powers are now made incidental to the mortgagee's exercise of his statutory power of sale.

Pages 500 and 513.—By sect. 11, a memorandum of the restrictive covenant may now be indorsed upon (or otherwise annexed to) some material title-deed, so as to convey *express* notice of it to all whom it may affect.

THE

PRINCIPLES OF EQUITY.

PART I.

INTRODUCTORY.

CHAPTER I.

THE JURISDICTION IN EQUITY.

Nature and character of the jurisdiction in equity.

EQUITY, although it corresponds in a general way with natural justice, is yet (*as administered in the Courts*) much less wide than natural justice,—comprising only that portion of natural justice which was *of a nature to be judicially enforced*, but which the old Common Law Courts omitted to enforce (*a*); and accordingly it is the province of equity to "*supply the defects*" of the common law, and to "*mitigate*" (where, in the interests of justice, it is proper to mitigate) the too extreme "*rigours*" of the common law.

The older definitions of equity, stated and explained.

Equity in modern times, —character of.

Equity was in old times comparatively free from the control of precedents, "*the measure of the Chancellor's foot*" having then been (and necessarily) the only measure of the equity jurisdiction. But a Court of Equity is now bound by precedents and by settled rules, as completely as a Court of Common Law is bound; and there is not, in fact, a single principle of interpretation (*b*), or

(*a*) *Cowper* v. *Cowper*, 2 P. Wms. 720, on pp. 753, 754.
(*b*) *Salmon* v. *Duncombe*, 11 App. Cas. 627.

rule of evidence even (*c*), that is not now indifferently applicable in both the King's Bench and the Chancery Divisions.

Origin of the jurisdiction in equity,—the causes of.

(1) The inelastic and inflexible procedure of the common law.

(1) By the old common law, every species of civil wrong was supposed to fall within some particular class; and for every class, an appropriate remedy existed, called *a writ* or BREVE,—the writ being the first step in every action; and the litigant was required to choose the appropriate writ, and any preliminary stumbling on his part in the choice of the writ used to be fatal to his action.

(2) "The Statute in Consimili Casu," —failure of the remedy thereby provided.

(2) Where the alleged wrong did not fall within any of the recognised writs, the plaintiff was without any redress whatever,—Until, by the statute "In Consimili Casu" (13 Edw. I. s. 1, c. 24), it was enacted, that "whensoever from henceforth it shall fortune that in one case a writ is found, and in the like case (requiring the like remedy) none is found, the writ clerks shall agree in making the writ,"—and failing to agree upon any form of writ, they were to adjourn the matter to the next Parliament.

(3) The Lord Chancellor, by direction of the sovereign and of Parliament, personally intervened, at length, in 22 Edw. III.

(3) The statute "In Consimili Casu" proved, however, a wholly inadequate remedy; and the only course which then remained open to suitors, was to petition the King in Council: Upon which petition, the King used to refer the matter (on each particular occasion) to the "Keeper of his Conscience" (the Chancellor) for his consideration; and eventually, in the reign of Edward III., the Court of the Chancellor (*Scil.*, the Court of Chancery), became a permanent jurisdiction, distinct from the Common Law Courts, and empowered to give relief in all those cases which appeared to demand "*extraordinary*" relief,—the ordinance 22 Edw. III. having referred, generally, all matters which were "*of grace*" to the Chancellor.

Bill or petition in equity.

And from the date of that ordinance, suits by petition or bill (*without any preliminary writ*) became the common course of procedure in the Court of Chancery,—On which bill or petition being presented, if the Chancellor (on personally looking into it) thought that the matter was one "*of grace*," and that it called for *extra-*

(*c*) *Doig* v. *Birrell*, 1899, 2 Ch. 50.

ordinary relief, *a writ of subpœna* was issued by him, *summoning the defendant to* APPEAR *and to* ANSWER *the complaint, and to abide by the order of the Court.* Latterly, the personal examination of the bill by the Chancellor was dispensed with, the signature of counsel to the bill being accepted as sufficient for the issue of the writ of subpœna (*d*); and, by the Chancery Jurisdiction Act, 1852 (*e*), the writ of subpœna to *appear* and to *answer* the complaint was (as from the year 1852) superseded altogether, being replaced by a mere indorsement to the like effect on the bill.

The modern fusion of law and equity.

By and in consequence of the Judicature Acts, 1873—1910, and the rules and orders from time to time made thereunder, law and equity have now been fused into one system, and a uniform procedure in the Chancery Division and in the King's Bench Division has been introduced, and has become established. And regarding such new procedure, it is sufficient to mention, that an action in the Chancery Division of the High Court is now commenced (as in the King's Bench Division) by issuing a writ,—the writ being now capable of expressing every form of possible claim; and the writ may or may not be followed up by a statement of claim on the part of the plaintiff,—such statement of claim corresponding with the old bill to the Lord Chancellor, and being usually the first pleading on the part of the plaintiff in the action.

Classification of equity jurisdiction—prior to, and so far also as affected by, the Supreme Court of Judicature Act, 1873.

Prior to the fusion of law and equity so effected, it was usual (in Treatises on Equity) to classify the various subject-matters falling within the jurisdiction of equity *by relation to the common law*,—and accordingly to subdivide the jurisdiction under three heads, viz., the *Exclusive*, the *Concurrent*, and the *Auxiliary* jurisdictions in equity. But, by the Judicature Act, 1873, ss. 24, 25, in every civil cause or matter, law and equity are now to be administered *concurrently*,—each Division of the High Court exercising all the jurisdiction of the other Divisions (in addition to its own proper jurisdiction); and where there is any conflict or variance between the

(*d*) Langdell's Summary of Equity Pleading.
(*e*) 15 & 16 Vict. c. 86.

rules of equity and the rules of the common law, the rules of equity are to prevail.

However, by s. 34 of the Act, it is expressly enacted, that (subject to the general provisions of the Act) there shall be assigned to the Chancery Division all the causes and matters which are specified in the now stating section, and which comprise (roughly) all the various matters which (prior to the fusion) used to fall within the *exclusive* jurisdiction of equity.

The old distinction between the *exclusive* and the *concurrent* jurisdictions, —importance of maintaining.

The effect, therefore, of the Judicature Acts has been (1) to nominally put an end to the *exclusive* jurisdiction of the Court of Chancery, and yet (2) to retain as exclusive all that part of the jurisdiction which was originally exclusive; but (3) it abolishes the *auxiliary* jurisdiction altogether, both nominally and practically,—*Scil.*, relatively to the Common Law Courts,—Because the suitor in the King's Bench Division now no longer needs the *aid* (auxilium) of the Chancery Division for any purpose whatsoever. Therefore, the "EXCLUSIVE" jurisdiction of equity must now be called the *originally exclusive* jurisdiction,—the jurisdiction being now, in all cases, "CONCURRENT"; but with only that one (merely verbal) modification, the distinction between the originally exclusive jurisdiction and the originally concurrent jurisdiction is still one of vital importance,—it being *equitable* estates rights and remedies which are regarded in the originally exclusive jurisdiction, while it is *legal* estates rights and remedies that are regarded in the originally concurrent jurisdiction (*f*): And, *nota bene*, the principles of equity differ very materially, according as it is sought to apply them in the one or in the other of these two jurisdictions (*g*): Wherefore the old distinction is proper enough to be retained in treating of equity,—and it is convenient also to retain it.

(*f*) *Clements* v. *Matthews*, 11 Q. B. D. 808, on p. 814; and the distinction was approved on pp. 286, 287, in 15 Q. B. D. (*Joseph* v. *Lyons*).
(*g*) *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, 1899, 2 Ch. 392.

CHAPTER II.

THE MAXIMS OF EQUITY.

EQUITY is pre-eminently a science,—and starts with and assumes certain maxims, which embody the fundamental notions (or postulates) of the science; and the maxims of equity are the twelve following, that is to say:—

Maxims of equity.

(1) Equity will not (by reason of a merely *technical* defect) suffer a wrong to be without a remedy;
(2) Equity follows the law;
(3) Where there are equal equities, the first in time shall prevail;
(4) Where there is equal equity, the law shall prevail;
(5) He who seeks equity, must do equity;
(6) He who comes into equity, must come with clean hands;
(7) Delay defeats equities;
(8) Equality is equity;
(9) Equity looks to the intent, rather than to the form;
(10) Equity looks on that as done, which ought to have been done;
(11) Equity imputes an intention to fulfil an obligation; and
(12) Equity acts *in personam*.

(1) Equity will not, by reason of a merely *technical* defect, suffer a wrong to be without a remedy.
Rent, recovery of.

(1) *Equity will not (by reason of a merely* TECHNICAL *defect) suffer a wrong to be without a remedy.*—For example, where there was a legal mortgage and the mortgagor wanted either to recover the possession or to distrain for his rent, he could not do it at law,—save in the name of (and as the bailiff of) the mortgagee; but he could do it in equity; and the rule of equity in these respects is now (by the Judicature Act, 1873, s. 25, subs. 5) the rule at law also. But the mortgagee (being the legal owner) still remains the legal owner, for the purpose

of accepting a surrender of the lease (*a*), and for the purpose also of suing the lessee on his covenants in the lease (*b*), and of giving the notice (before ejectment) which is now (by the Conveyancing Act, 1881, s. 14) required to be given to the lessee (*c*),—although, *semble*, the mortgagor may also (under s. 10 of that Act) sue for the lessee's breach of covenant (*d*).

Execution.

Also, where a successful plaintiff could not have had legal execution, because of a prior legal mortgage, equity interposed and gave him "*equitable relief in the nature of execution*" (*e*), by the appointment of a receiver, with or without an injunction (*f*), or other incidental relief (*g*); and the Common Law Courts also now grant the like relief. But, in all these cases of equitable execution, it is to be understood, that there is some technical difficulty in the way (whereby the proper legal execution,—whether by *fi. fa.* for goods (*h*), or by *elegit* for lands (*i*),—is not available), and that (but for that technical difficulty) the proper legal execution could have issued.

(2) Equity follows the law.

(2) *Equity follows the law.*—That is to say, as regards *legal* estates, equity is strictly bound by the rules of law, and acts in obedience to them; and as regards *equitable* estates, equity, although not *bound* by the rules of law, yet acts in analogy to them, wherever an analogy exists.

(a) Originally concurrent jurisdiction: Primogeniture, and rules of descent generally.

And, firstly, as regards *Legal estates*,—It is well settled, that equity follows the law, in applying (*e.g.*) all the canons of descent,—and in particular the rule of primogeniture, although that rule may in any particular application of it be productive of the greatest apparent hardship towards the younger sons, there being no equity to the contrary in their favour. And even where the special circumstances create an equity to the contrary, the Courts of Equity never break through the rules of law,—being

Following the law, equity may at the same time avoid it in effect,—

(*a*) *Robbins* v. *Whyte*, 1906, 1 K. B. 125.
(*b*) *Molyneux* v. *Richard*, 1906, 1 Ch. 34.
(*c*) *Matthews* v. *Usher*, 1900, 2 Q. B. 535.
(*d*) *Turner* v. *Walsh*, 1909, 2 K. B. 484.
(*e*) *In re Shephard*, 43 Ch. D. 131.
(*f*) *Lloyds Bank* v. *Medway Navigation*, 1905, 2 K. B. 359.
(*g*) *Wells* v. *Kilpin*, L. R. 18 Eq. 298.
(*h*) *Manchester, &c. Banking Co.* v. *Parkinson*, 22 Q. B. D. 173.
(*i*) *In re Shephard*, *supra*.

bound thereby; but while maintaining these rules and even founding upon them, they will avoid them in effect. —For example, if an eldest son should prevent his father from executing a proposed will devising an estate to one of the younger sons *by promising to convey that estate to his younger brother*, and the estate accordingly is left to descend at law to the eldest son *as a consequence flowing from his promise*, a Court of Equity would, in such a case, interpose and say,—"True it is, you (the eldest son) have the estate at law,—in other words, the legal estate; that we don't deny or interfere with: *but precisely because you have it*, you will make a convenient trustee of it for your younger brother, who (in our opinion) is equitably entitled to it,—*Scil.*, because, *but for your promise*, he would have had it under the proposed devise of it" (*k*).

On the ground of estoppel.

And equity interposes in such cases on the ground of *estoppel*,—So that where there is a clear estoppel, it matters not, whether the Court is dealing with the heir (entitled under an intestacy), or with the legal devisee or residuary legatee (entitled under a will (*l*)); and the person entitled at law under a *fine* even (*m*) or under a *common recovery* even (*n*),—which two conveyances were conveyances by record (and therefore of the very highest legal efficacy),—would have been declared to be (in such a case) a mere trustee in equity: Therefore, where the devisee entitled under a will prevented the testator from making a codicil (*o*),—or where the residuary legatee did the like (*p*),—in each case by representing that he (the devisee) or she (the universal legatee) would hold himself or herself bound to carry out the intended gift, the Court has made good the gift. Similarly, where the intended gift was of a bond in which the residuary legatee was the obligor (*q*).

(*k*) *Podmore* v. *Gunning*, 7 Sim. 644, citing *Sellack* v. *Harris*, 5 Vin. Abr. 521.
(*l*) *Norris* v. *Frazer*, L. R. 15 Eq. 318.
(*m*) *Barnesby* v. *Powel*, 1 Ves. Sr. 284.
(*n*) *Ferres* v. *Ferres*, 2 Ab. Eq. 695.
(*o*) *Barrow* v. *Greenough*, 3 Ves. 151.
(*p*) *In re Maddock*, 1902, 2 Ch. 220.
(*q*) *Drakeford* v. *Wilks*, 3 Atk. 540.

Loffus v. *Maw*, —instance of equity avoiding the law.

Also, where a testator in advanced years and in ill-health induced his niece to reside with him as his housekeeper, on the *verbal* representation that he had left her certain property by his will,—which in fact he had prepared and executed in her favour, but subsequently by a codicil revoked,—the Court directed, that the trusts of the will in favour of the niece should be performed,—*Scil.*, upon the ground that a representation that property is given (even though by a revocable instrument) is fully binding and effective in equity, where the person to whom the representation is made has acted upon the faith of it to his or her detriment (*r*). In other words, the complete legal conveyance, effected by the operative testamentary document, was left to subsist unaffected, but to subsist *subject to the contract in favour of the niece*, —upon the ground that the testator had already during his lifetime, and *to the extent of that contract*, fettered his own free power of devise. It is to be noted, however, that where the representation is of an *intention* simply (or is a mere promise upon honour), it will not operate as an estoppel,—for the purpose of avoiding the legal effect of the document (*s*); and the estoppel (even where it is a true estoppel) may have been discharged, meanwhile (*t*).

Effect,—where no estoppel.

(b) Originally exclusive jurisdiction: Words of limitation in deeds and wills,—trusts executed, and trusts executory.

Secondly, as regards *Equitable* estates.—In construing the words of limitation (of trust estates) in deeds and wills, Courts of Equity follow, in general, the "Rule in *Shelley's case*," and also observe all the other rules of law,—relative to the construction of (*u*) and necessity for (*x*) words of legal limitation,—*Scil.*, in a conveyance, as distinguished from a mere *contract* for value to convey (*y*).

(c) Originally concurrent and originally exclusive jurisdictions: The Statutes of Limitations.

It is instructive also, in connection with this maxim, to observe the manner in which equity dealt with and deals with the statutes for the limitation of actions and suits: That is to say,—Although the old Statutes of

(*r*) *Loffus* v. *Maw*, 3 Giff. 592; *Coles* v. *Pilkington*, L. R. 19 Eq. 174.
(*s*) *Jorden* v. *Money*, 5 H. L. C. 185.
(*t*) *Stone* v. *Hoskins*, 1905, P. 194.
(*u*) *Lovatt* v. *Williamson*, 1894, 1 Ch. 661.
(*x*) *Irwin* v. *Parkes*, 1904, 2 Ch. 752.
(*y*) *Tringham* v. *Greenhill*, 1904, 2 Ch. 457.

Limitation were applicable to Courts of law only, yet equity acted upon them by analogy,—and, in general, refused relief where the statutes would have been a bar at law. But further, equity always discountenanced laches, and held that, to an equitable demand, laches was as valid a defence in equity as the positive bar of time at law,—So that, in the case of equitable titles and equitable remedies, equity required, in general, that the relief, whether as regards land (*z*) or as regards personal estate (*a*), should be sought within (at the latest) the period prescribed for the like relief at law: And in accordance with that old distinction (which still, in effect, continues), whenever equity is dealing with equitable rights or is granting equitable redress, and there has been laches or delay, equity is even stricter than the law,—For while there are no cases in which equity will give relief (where the statutes would be a bar at law), yet there are many cases where the statutes would not be a bar at law, in which equity will notwithstanding refuse relief (*b*): In other words, equity, in its originally *exclusive* jurisdiction, never exceeds (although it may stop short of) the limit of time prescribed at law (*c*), and in its originally *concurrent* jurisdiction, equity never either exceeds or stops short of the limit of time prescribed at law (*d*). But, of course, in the case of *fraud*, the Statutes of Limitation run both at law and in equity, from the time of the discovery only of the fraud (*e*); and although, in actions for negligence, it may be otherwise (*f*) and although mere ignorance of one's right of action will not prevent the statutes from running (*g*), still negligence which *amounts to fraud* (*h*), *or ignorance induced by fraud* (*i*) will have that effect; and occasionally, but for the purposes of equitable relief only, a mere mistake will, in equity, be deemed a fraud (*k*).

(*z*) *Beckford* v. *Wade*, 17 Ves. 99.
(*a*) *Knox* v. *Gye*, L. R. 5 H. L. 656.
(*b*) *Blake* v. *Gale*, 31 Ch. D. 196.
(*c*) *In re Maddever, Three Towns* v. *Maddever*, 27 Ch. D. 523.
(*d*) *Fullwood* v. *Fullwood*, 9 Ch. D. 176.
(*e*) *Gibbs* v. *Guild*, 9 Q. B. D. 59.
(*f*) *Dooby* v. *Watson*, 39 Ch. D. 178.
(*g*) *Rains* v. *Buxton*, 14 Ch. D. 537.
(*h*) *Oliver* v. *Hinton*, 1899, 2 Ch. 264.
(*i*) *Bulli Coal Co.* v. *Osborne*, 1899, A. C. 351.
(*k*) See Banning on the Limitation of Actions, 3rd ed., pp. 226, 227.

(3) *Qui prior est tempore, potior est jure.*

True statement of the rule.

(3) *Where the equities are equal, the first in time shall prevail,*—That is to say, as between persons having only equitable interests, *if such equities are in all other respects equal (and not otherwise)*, the first in time shall be the first in right,—*Qui prior est tempore, potior est jure:* In other words, in a contest between persons having only equitable interests, *priority of time is the ground of preference last resorted to;* and a Court of Equity never prefers the one to the other,—*on the mere ground of priority of time,*—until, on an examination of the relative merits, it finds that there is no other ground of preference between them (*l*). For example, where A., B., and C. (three vendors entitled in common to a piece of land) sold the land to D.; and on the day for the completion of the purchase, they executed the deed of conveyance to D.; and in the body of the deed the payment of the *entire* purchase-money was acknowledged by A. and B., and also by C.; and A. and B., and also C., severally also signed receipts endorsed on the deed of conveyance for their respective purchase-moneys; and thereupon C. (although in fact he had not been paid his proportion of the purchase-money) negligently let D. take away the deed of conveyance (together with the other title-deeds) in his bag; and D. the same afternoon deposited the deeds with his bankers,—The Court held, that, *as between the bankers* (equitable mortgagees by deposit) *and C.* (unpaid vendor having equitable lien), the bankers, although second in date, were first in right, *because of C.'s negligence* (*m*): Which negligence, it is to be observed, consisted in a *positive* act of imprudence on C.'s part,—and of an imprudence which proximately led the bankers to accept the proffered security of the title-deeds (*n*). And but for such *positive* act on C.'s part, C. would have retained his priority (*o*),—Because, generally, as between successive equitable estates, the first in time will prevail (*p*).

Illustration of the rule.

Limits of the rule.

(*l*) *Capell* v. *Winter*, 1907, 2 Ch. 376.
(*m*) *Rice* v. *Rice*, 2 Drew. 73.
(*n*) *Rimmer* v. *Webster*, 1902, 2 Ch. 163.
(*o*) *Shropshire Union Railway* v. *Reg.*, L. R. 7 H. L. 196.
(*p*) *In re Samuel Allen*, 1907, 1 Ch. 575.

(4) Where there is equal equity, the law shall prevail.

(4) *Where there is equal equity, the law shall prevail,* —That is to say, where the defendant has a claim to the *passive* protection of the Court, and his claim is equal to the claim which the plaintiff has to call for the *active* aid of the Court, the Court will do simply nothing,—So that the defendant who has the legal estate will prevail: And, for example, where the trustee of a sum of stock for T., had (*in a suit instituted by T.*) transferred what purported to be T.'s trust fund into Court, and the fund had been thereafter treated as belonging to T.'s estate,—And it appeared afterwards, that the trustee had provided himself with the means of paying T.'s fund into Court by fraudulently misappropriating funds which he held in trust for B.,—Upon the question, whether B. had the right to follow the money in Court *as against T.*, the Court held that B. had no such right,—*Scil.*, Because B.'s right to follow the money was no greater than T.'s right to retain it; *and the circumstance of the legal title being held for T.* was sufficient to create a preference in T.'s favour (*q*); and the principle of that decision has been followed in many modern cases.

Defence of purchase for valuable consideration without notice: (a) Plaintiff having equitable estate only, defendant legal estate and equitable estate both.

A defendant may therefore, in general, set up, and successfully set up, the defence that he has purchased the property for value and without notice: Because, firstly, where the defendant who sets up that defence has the legal estate, *and has obtained it at the time of his purchase,* equity will grant no relief against him (*r*); and although he should not have obtained the legal estate at the time of his purchase, yet he may protect himself by *subsequently getting in the legal estate* (*s*), so long as he does it without becoming party to a breach of trust (*t*), —*Scil.*, because the equities of both parties being equal, there is no reason why the purchaser should be deprived of the advantage which he subsequently obtains at law by his superior diligence. Also, in the case of *lands* (*u*),

(*q*) *Thorndike* v. *Hunt*, 3 De G. & J. 563.
(*r*) *Jones* v. *Powles*, 3 My. & K. 581.
(*s*) *Saunders* v. *Dehew*, 2 Vern. 271.
(*t*) *Carter* v. *Carter*, 3 K. & J. 617.
(*u*) *Wilmot* v. *Pike*, 5 Hare, 14.

although not in the case of *personal* estate (*x*), where the purchaser has not *actually obtained* but has only the *best right to obtain* the legal estate, he will be entitled to its protection. And here note that, in the case of lands, a purchaser for value who obtains possession of all the title-deeds,—or who (failing that) takes a declaration of trust from the trustee,—is considered to have the best right to call for the legal estate in the lands, *as against any other merely equitable purchaser who has neglected to do so* (*y*): All which rules apply also in favour of mortgagees,—whether legal or equitable (*z*).

(b) Plaintiff having legal estate, and defendant equitable estate.

But, secondly, where the defendant who sets up the defence has only the equitable title, and the plaintiff has the legal title,—The defence, although it used to be good where the plaintiff applied to the *auxiliary* jurisdiction of the Court (*a*), is not *now*, and since the Judicature Acts, 1873—75, has not been, a good defence at all, either to the discovery of, or to the delivery up of, the title-deeds of an estate (*b*). And even under the old law, the defence in question was never effective, in cases where the Court of Chancery (*concurrently* with the Courts of Common Law) afforded *legal* relief (*c*); or, generally, where the plaintiff could prove his case, without requiring the Court to *aid* him in doing so (*d*).

(c) Plaintiff having equitable estate only, defendant also having equitable estate only.

Thirdly, where neither the plaintiff nor the defendant had the legal estate, and neither of them (in the case of *lands*) had any better right than the other to call for the legal estate, *but each of them had the equitable estate only*,—The Court never gave any aid or preference to either, but determined their rights by reference to their respective dates; and the same rule still holds good,—*Scil.*, Because "every conveyance of an equitable in-

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(*x*) *Roots* v. *Williamson*, 38 Ch. D. 485.
(*y*) *Buckle* v. *Mitchell*, 18 Ves. 100.
(*z*) *Maxfield* v. *Burton*, L. R. 17 Eq. 15.
(*a*) *Basset* v. *Nosworthy*, Rep. t. Finch, 102; *Wallwyn* v. *Lee*, 9 Ves. 24.
(*b*) *Ind* v. *Emmerson*, 12 App. Ca. 300.
(*c*) *Newton* v. *Newton*, L. R. 4 Ch. App. 143.
(*d*) *Cooper* v. *Vesey*, 20 Ch. Div. 611.

terest is an *innocent* conveyance, *the grant of a person entitled in equity passing only that which he is justly entitled to, and no more,*—so that, if *the estate be subject to* (*e.g.*) *a prior mortgage,* the grantee takes subject to that, *taking only that which is left in the grantor*" (*e*).

(d) Plaintiff having an equity merely, and not an equitable estate, defendant having both legal and equitable estate.

Fourthly, where the plaintiff has an "*equity*" merely,—an equity (*e.g.*) to set aside a deed for fraud, or to correct it for mistake or accident,—and the defendant has both the legal and the equitable estate,—the Court will not interfere: Where, therefore, a man (already married) went through the ceremony of marriage with a woman, and then he and she sold and assigned to the defendant for value her life interest in a certain trust fund of the woman's,—it was held, that, though she might not have executed the instrument if she had been aware of the fraud practised upon her, still such fraud could not affect the rights of the defendant (the *bonâ fide* purchaser (*f*)). And *nota bene*, although the "*equity*" of the plaintiff (in such a case) *to set aside the sale,* is (for some purposes) an equitable estate,—and is descendible and devisable (*g*),—still such an *equitable* estate in the plaintiff is not permitted to prevail against the complete *legal* (and equitable) estate in the defendant.

An equity is, for some purposes, an estate.

(5) He who seeks equity, must do equity,—illustrations of this maxim

(5) *He who seeks equity, must do equity.*—The general rule of the old common law having been, that when a woman married, all her *personal* property (not being her *separate* estate) passed (in title) to her husband, including her *choses in action* which he could (during the coverture) reduce into possession,—Therefore, the moment the husband was obliged to seek the aid of a Court of Equity towards the realisation of his wife's property, the Court told him,—on the principle of this maxim,—"We will help you to get this property *on condition that you make a fair settlement out of it for the benefit of your wife and children;* and otherwise we will not aid you at all." Or again, where a person had the true title to an estate, and knowingly suffered some third person (who was ignorant

(*e*) *Phillips* v. *Phillips*, 31 L. J. Ch. 321.
(*f*) *Sturge* v. *Starr*, 2 My. & K. 195.
(*g*) *Dickenson* v. *Burrell*, L. R. 1 Eq. 337.

of his title) to expend money in permanently improving the estate, and then *afterwards* came forward asserting his title to the estate,—although (upon proving his legal title) judgment that he do recover the possession (together with the improvements) would have been given for him at law, still in equity (*and now also in a Court of law*), the plaintiff must, in such a case, reimburse the third person his expenditure (*h*).

(6) He who comes into equity must come with clean hands,—illustration of this maxim.

(6) *He who comes into equity, must come with clean hands.*—For example, where an infant (fraudulently concealing his age) obtained from his trustees part of a sum of stock to which he was entitled only on coming of age; and when of age (a few months afterwards), he applied for and received the residue of the stock; and, subsequently, he instituted a suit against the trustees, to compel them to pay over again the portion of the stock which had been (*improperly*) paid by them to him during his minority,—The Court held, that neither the infant (nor his assignees) could enforce payment over again of the stock paid during the minority (*i*),—*Scil.*, because, although the legal right of the plaintiff to be paid might continue (*the former payment having been no acquittance of the debt at law*), yet the legal right was deemed to be paralysed by the conflicting equity. Similarly, a married woman (*k*). But where, by reason of some initial illegality in the contract itself, the legal right of action on it is avoided, the defendant merely pleads the legal defence of illegality (*l*), and is not required (in such a case) to plead any equity at all; and, it rather appears, that any illegality,—whether in the contract itself (*m*) or in the consideration for it,—*which goes to the very root of the contract* (*n*),—avoids the right of action on it.

(7) Delay defeats equities,—illustrations of this maxim.

(7) *Delay defeats equities,*—Otherwise,—*Equity aids the vigilant, not the indolent.*—In the words of Lord

(*h*) *Dann* v. *Spurrier*, 7 Ves. 231; *Powell* v. *Thomas*, 6 Ha. 300.
(*i*) *Overton* v. *Banister*, 3 Hare, 503; and see *Nail* v. *Punter*, 5 Sim. 555.
(*k*) *In re Lush's Trusts*, L. R. 4 Ch. App. 591.
(*l*) *St. John* v. *St. John*, 11 Ves. 535.
(*m*) *Gas Light* v. *Turner*, 5 Bing. N. C. 666.
(*n*) *Lound* v. *Grimwade*, 39 Ch. D. 605.

Camden (*o*), "a Court of Equity has always refused its aid to *stale demands*, where the party has slept upon his rights for a *great* length of time."—And even a comparatively *short* period of delay (that is, of *laches* or of "*standing by*"), not satisfactorily accounted for, tells heavily against a plaintiff in equity, *suing in respect of an equitable right or for equitable relief*,—*Scil.*, Because the delay is evidence of a *waiver* of the right of action (*p*),—and sometimes is (or amounts to) a *release* of the very right itself (*q*); and, in such a case, every intendment will be made in favour of the defendant (*r*). Also, a plaintiff whose own right to equitable relief is gone by laches may not, usually at least, get that relief indirectly by suing in the name of the Attorney-General (*s*). But as regards reversioners and remaindermen, although laches is imputable to them, it is not so readily imputed to them,—Because they may, in general, wait till the reversion or remainder falls into possession before they sue (*t*); and the delay may otherwise be satisfactorily accounted for,—in which latter case, it will, usually, not matter (*u*).

(8) *Equality is equity.*—Although, if two persons purchase an estate, and pay the purchase-money in EQUAL portions, *and take the conveyance to them jointly*, the survivor will take the whole estate both at law and in equity,—Still, where, in such a case, equity can lay hold of any circumstance to prevent the survivorship, it will do so,—*Scil.*, because joint-tenancy is not favoured in equity. Therefore, where four or more adventurers PURCHASED lands (*x*), and found the purchase-money in *unequal* shares,—and all that appeared by the deed itself,—That one circumstance of inequality was held sufficient to make them *partners*,—So that, although the legal estate survived, yet the survivors were in equity but trustees

(8) Equality is equity,—illustrations of this maxim.

(a) Purchase-money advanced in *unequal* shares.

(*o*) *Smith* v. *Clay*, 3 Bro. C. C. 460; *Hovenden* v. *Annesley*, 2 Sch. & Lef. 633; *Brooks* v. *Muckleston*, 1909, 2 Ch. 519.
(*p*) *Pettiward* v. *Prescott*, 7 Ves. 541; *Roberts* v. *Tunstall*, 4 Ha. 257.
(*q*) *Stackhouse* v. *Barnston*, 10 Ves. 453.
(*r*) *Watt* v. *Assets Co.*, 1905, A. C. 317.
(*s*) *A.-G.* v. *Grand Junction Canal*, 1909, 2 Ch. 505.
(*t*) *Life Association of Scotland* v. *Siddall*, 3 De G. F. & J. 58.
(*u*) *Lindsay Petroleum* v. *Hurd*, L. R. 5 P. C. 221.
(*x*) *Lake* v. *Gibson*, 1 Eq. Ca. Abr. 294.

(b) Money advanced on mortgage in *equal* or in *unequal* shares.

for themselves and the others in proportion to the sums advanced. Also, where two persons advance a sum of money (whether in *equal* or in *unequal* shares) by way of MORTGAGE, *and take the mortgage to them jointly*, and one of them dies, the survivor shall not in equity have the whole money due on the mortgage; but the representatives of the deceased mortgagee shall have his proportion of it,—Because the mere circumstance of the transaction being a *loan* is sufficient to repel the presumption of a joint-tenancy (*y*).

Nor will the Court treat the mortgage as joint in equity, although it should contain a clause to the effect that the money belongs to the lenders on a joint account (*z*),—which clause is a merely usual clause, and is not (for this purpose) conclusive at all. And even in the case of a purchase enuring both at law and in equity as a joint purchase, equity will treat a mere *contract* to aliene (being a contract for value) as a severance of the jointure (*a*),—so as to exclude in equity the incident of survivorship; and a marriage settlement (if ante-nuptial) will for this purpose be deemed a contract for value (*b*), although the marriage itself would not (save as regards the pure personal chattels of the wife) have operated as a severance (*c*).

(9) Equity looks to the intent rather than to the form,—illustration of this maxim.

(9) *Equity looks to the intent, rather than to the form.*—This maxim lies at the root of the equitable doctrine of relieving against forfeitures, penalties, and the like (*d*)—all of which subjects are fully considered in the later chapters of this treatise.

(10) Equity looks on that as done which ought to have been done,—illustration of this maxim.

(10) *Equity looks on that as done, which ought to have been done.*—That is to say, a Court of Equity will treat a contract or agreement for value to do a thing, as if the thing was already done,—although not in favour of an heir-at-law or other *volunteer* (*e*): Wherefore all agreements for value are considered as performed as from the

(*y*) *Morley* v. *Bird*, 3 Ves. 361.
(*z*) *Smith* v. *Sibthorpe*, 34 Ch. D. 732.
(*a*) *Brown* v. *Raindle*, 3 Ves. 256.
(*b*) *Burnaby's case*, 28 Ch. D. 416; *Hewett* v. *Hallett*, 1894, 1 Ch. 362.
(*c*) *Hughes* v. *Anderson*, 38 Ch. D. 286.
(*d*) *Barton* v. *New South Wales Bank*, 15 App. Ca. 379.
(*e*) *Chetwynd* v. *Morgan*, 31 Ch. Div. 596.

time when (according to their tenor) they ought to have been performed,—and they have (for most purposes) all the same consequences as if they had then been completely done. For example, agreements for leases, where they are specifically enforceable (*f*),—and especially where the possession has been given (*g*),—are regarded as actual leases (*h*); and money by deed covenanted (or by will directed) to be laid out in land, is (for the purposes of its further devolution) treated as already land in equity, from the moment that the deed and will respectively operate.

(11) Equity imputes an intention to fulfil an obligation,—illustration of this maxim.

(11) *Equity imputes an intention to fulfil an obligation.*—Where a man is under an obligation to do an act, and he does some other act *which is capable of being considered as a fulfilment of his obligation*, such latter act shall be so considered,—Because it is right to presume, that a man intends to be just before he affects to be generous. Therefore, if a husband covenants with the trustees of his marriage settlement to pay to them the sum of £2,000, to be laid out by these trustees in the purchase of lands in the county of D., to be settled upon the trusts of the settlement,—although the covenantor never pays the money to the trustees, but after the marriage purchases lands in the specified county, and takes a conveyance thereof to himself in fee, and then dies intestate, without bringing the lands into settlement,—The purchased lands are considered in equity as purchased by the husband in pursuance of his covenant, and as being (in fact) his *performance* of that covenant (*i*).

(12) Equity acts *in personam*,—illustrations of this maxim.

(12) *Equity acts* in personam.—This maxim is descriptive of the *procedure* in equity; and it is of the first importance to understand it, as well in its application as in the limits of its application:

And, Firstly, as regards *the Application* of the maxim.—In *Penn* v. *Lord Baltimore* (1750), 1 Ves. Sen. 444,—

(*f*) *Foster* v. *Reeves*, 1892, 2 Q. B. 255.
(*g*) *Zimbler* v. *Abrahams*, 1903, 1 K. B. 577.
(*h*) *Walsh* v. *Lonsdale*, 21 Ch. D. 9; *Swain* v. *Ayres*, 21 Q. B. D. 289.
(*i*) *Sowden* v. *Sowden*, 1 Bro. C. C. 582.

which was a suit regarding land in the United States (*Scil.*, beyond the jurisdiction),—Lord Hardwicke, L.C., stated (in effect) as follows:—"Although this Court cannot (in the case of lands situate abroad) issue execution *in rem*, still I can enforce the judgment of the Court (which is *in personam*) by process *in personam*,—*e.g.*, by attachment of the defendant *when the defendant is within the jurisdiction* (or by sequestration of his goods or lands *within the jurisdiction*), until he do comply with the order or judgment of the Court, *which is against himself* (*the defendant*) *personally, to do or to abstain from doing some act.*" And accordingly, *where the title itself to the land is not in question*, the Court is in the habit of entertaining actions for an account of the rents and profits of the land, and for a receiver (*k*); and for specific performance of an agreement for a sale or lease of the land, and for an injunction relative to the use of the land (*l*),—but not also for damages in respect of a trespass to the land (*m*). And the Court will also, in a proper case, give judgment for the foreclosure of mortgages (*n*), and for the enforcement of equitable charges (*o*), and for the execution of conveyances of land situate abroad, and whether within the King's dominions or not. Also, by the Trustee Act, 1893 (*p*), s. 41, the Court is now enabled to make vesting orders as to land (and personal estate) situate in any part of the King's dominions (other than Scotland).

Secondly, as regards *the Limits to the Application* of the maxim.—If in any case the very title itself to the lands comes in question, the Court will not direct even an account of the rents and profits, or of the sale-proceeds of the lands (*q*),—and still less will the Court set aside (on the ground of fraud) any particular conveyance of such lands (*r*),—*Scil.*, Because the questions involved are exclusively appropriate for the country in which the property is situate (*lex loci rei sitæ*). Also, in respect of a

(*k*) *Mercantile Investment Co.* v. *River Plate Co.*, 1892, 2 Ch. 303.
(*l*) *Ex parte Pollard*, 1 Mont. & Ch. 239.
(*m*) *De Sousa* v. *British South Africa*, 1893, A. C. 602.
(*n*) *Toller* v. *Carteret*, 2 Vern. 494; *Paget* v. *Ede*, L. R. 18 Eq. 118.
(*o*) *Duder* v. *Amsterdam Trustees*, 1902, 2 Ch. 132.
(*p*) 56 & 57 Vict. c. 53.
(*q*) *In re Hawthorne*, 23 Ch. Div. 743.
(*r*) *Deschamps* v. *Miller*, 1908, 1 Ch. 856.

trespass to lands situate abroad, the Court has no jurisdiction (*s*). Also, for a rent of inheritance issuing out of land abroad (and which is only recoverable by the *local* action of debt), the Court has no jurisdiction (*t*). Moreover, if in any case there is nothing which binds the conscience of the defendant in particular,—as where there is no contract whatever on the defendant's part which the Court can be asked to enforce, but the defendant is (*e.g.*) a mere assignee or transferee of the original contract,—The Court will not (nor can) enforce (*against such a defendant*) any equitable claim incident to lands abroad (*u*); and where the relief asked for by the plaintiff in England is properly incidental to the relief grantable by the foreign tribunal (within whose jurisdiction the lands abroad are situate), the English Courts will leave the plaintiff to effectuate his incidental rights before the foreign tribunal (*x*).

(*s*) *De Sousa* v. *British South Africa, supra.*
(*t*) *Whitaker* v. *Forbes*, L. R. 10 C. P. 583.
(*u*) *Vincent* v. *Godson*, 4 De G. M. & G. 546.
(*x*) *Norton* v. *Florence Land Co.*, 7 Ch. D. 332.

PART II.

THE ORIGINALLY EXCLUSIVE JURISDICTION.

CHAPTER I.

TRUSTS GENERALLY.

Uses, origin of.

ANCIENTLY, a simple gift of lands (by way of feoffment) to a man and his heirs, accompanied with livery of seisin, was all that was necessary in the law to convey to him an estate in fee simple in the lands. But, latterly, a new species of estate unknown to the ancient law came into existence: That is to say,—The early Statutes of Mortmain having prohibited lands being given to religious houses or to other corporations, the device was resorted to, of procuring the feoffment to be made to some third person *to the use* of the religious house or corporation; and in process of time, such feoffments to one person to the use of another became usual, even in cases where no question of religion (or of a corporation) entered. And in the case of all such feoffments, although the person (and he only) to whom the seisin was delivered, was *at law* considered the owner of the land, still the mere delivery of the seisin was not *in equity* deemed conclusive of the true ownership,—That is to say, equity was unable (it is true) to take from the feoffee the title which the law gave him,—*Scil.*, *because equity never sets aside, however much it may avoid, the law*,—But equity compelled the feoffee to make use of his legal title for the benefit of the person who had the true beneficial ownership: And accordingly, if A. conveyed land to B. to the use of C., that declaration of the use was held to charge the *conscience* of B.,—So that, if B. refused to account to his *cestui que use* (C.) for the profits, the Court of Chancery gave C. redress; and when the right of C. became thus recog-

nised in the Court of Chancery, C. became in fact the *equitable* (or true beneficial) owner, and B. remained merely the *legal* owner. And note, that by this device of uses, many of the rules and incidents of property were in danger of being defeated,—and doubtless, in many cases, were defeated; but the advantages which resulted from the device greatly outweighed its legal disadvantages: Of which advantages, the power of disposing of the lands by will was then the most valuable.

Advantages and disadvantages of the use.

The inroads which the device had made and was making on the ancient laws of tenure induced the Legislature to pass a statute for the regulation of these uses, viz., the Statute of Uses (*a*): By which statute, it was enacted, that where any person stood seised of any lands to the use of any other person, the person that *had* such use (by which was meant the person beneficially entitled) should be deemed in lawful seisin and possession of the lands and for such estate as he had in the use,—That is to say, the *use* became converted into the *land;* and it did not matter, for this purpose, whether the use (in such a case) was expressed in words or was merely *implied,*—for, in either case, where the use was, there also was the legal ownership of the land.

Statute of Uses, 27 Hen. VIII. c. 10,—converted the use into the legal estate, *i.e.*, into the land at law.

The professed object of the Statute of Uses, which was to extirpate the equitable use, gave, in fact, a fresh stimulus to that use: That is to say,—The common law judges having determined, that if A. (the legal owner) was directed to hold the land to the use of B., to the use of C., the statute would carry the land to B. at law, but would carry it no farther,—for the use in favour of C. was "*a use upon a use,*"—*i.e.*, a second use upon or after a first use, which the statute had no remaining energy to reach,—Therefore, equity (considering the plain intention of the gift) held, that the use in favour of C. should have effect as the old equitable use,—So that, after the passing of the statute, if it was desired to create an interest purely

Statute of Uses,—failure of its object; also, advantages resulting therefrom, indirectly.

(*a*) 27 Hen. VIII. c. 10.

equitable, nothing more was necessary than to limit *a use upon a use*, or to declare a second use; and this second *use* was, for distinction's sake, commonly called the *trust*.

Property to which the Statute of Uses is inapplicable.

The Statute of Uses was confined to *lands, tenements,* and *hereditaments,*—and therefore extended not to other species of property. And further, the statute (upon its own words) was applicable only where one person stood "*seised*" to the use of another; and seisin (strictly so called) applying to freehold lands only (and not to leasehold or to copyhold lands), therefore the statute was confined to the use of freehold lands (*b*); and as to freehold lands even, only uses of the description called *passive* uses (including passive *trusts* (*c*)), were within the statute.

Statute of Frauds,—trusts, originally created by parol, required henceforth in general to be created by writing.

Prior to the Statute of Frauds (*d*), trusts might have been created (and also transferred) by word of mouth only; but it was by that statute enacted,—By s. 7, that all *declarations* or *creations* of trusts or confidences of any *lands, tenements,* or *hereditaments* should be "*manifested and proved*" (*e*) by some writing, signed by the party by law enabled to declare such trusts (*f*), or by his last will in writing; and by s. 9, that all *grants* and *assignments* (that is to say, transfers) of any trust or confidence whatever should likewise be in writing, signed by the assignor (or transferor),—or by his last will; but, by s. 8, the statute recognised two exceptions, namely: (1) Trusts resulting by *implication of law* (*g*); and (2) Trusts transferred or extinguished by *operation of law*.

Property to which the Statute of Frauds is applicable.

The Statute of Frauds clearly, therefore, extends to freehold lands, and to copyhold lands (*h*), and to leasehold lands (or chattels real) (*i*); but chattels personal are

(*b*) Gilb. Us. 79; *Leach* v. *Jay*, 6 Ch. D. 496; 9 Ch. D. 42.
(*c*) *Williams* v. *Waters*, 14 Mee. & W. 166.
(*d*) 29 Car. II. c. 3.
(*e*) *Randall* v. *Morgan*, 12 Ves. 73.
(*f*) *Kronheim* v. *Johnson*, 7 Ch. Div. 60.
(*g*) *Bellasis* v. *Compton*, 2 Vern. 294.
(*h*) *Withers* v. *Withers*, Amb. 151.
(*i*) *Forster* v. *Hale*, 3 Ves. 669.

not within the 7th section (*k*), although they are (*semble*) within the 9th section, of the Act: And here note, that when the declaration of the trust is in writing, the writing must, as a general rule, contain all the terms of the trust (*l*), and must also be signed by the true beneficial owner (*m*),—although, in the case of charitable funds which have been supplied by voluntary contributions, the persons who (as a body) have been entrusted with the custody of them have an *implied* authority to declare the trusts for the time being applicable thereto (*n*); and a majority of such trustees may bind the minority of them (*o*).

(*k*) *Benbow* v. *Townsend*, 1 My. & K. 506.
(*l*) *Smith* v. *Matthews*, 3 De G. F. & J. 139.
(*m*) *Dye* v. *Dye*, 13 Q. B. D. 147.
(*n*) *Att.-Gen.* v. *Mathieson*, 1907, 2 Ch. 383.
(*o*) *Bp. of London* v. *Whiteley*, 1910, W. N. 63.

CHAPTER II.

EXPRESS PRIVATE TRUSTS.

An Express Private Trust is a trust created in express words by the author thereof; and these trusts are of many varieties:

(*A*) *Firstly, Trusts Executed and Executory.*

(*A*) *Executed or Executory Trusts.*

A trust is said to be *executed*, when no act is necessary to be done to constitute it,—as where an estate purports to be conveyed unto and to the use of A. in trust for B., and the conveyance itself actually conveys the estate: And, on the other hand, a trust is said to be *executory*, when there is a mere direction to convey upon trust, but the instrument which contains the direction does not of itself effect the conveyance.

As to trusts executed,—equity follows the law.

In the case of a trust *executed*, equity puts the same construction on the words of equitable limitation which the law puts on words of legal limitation; and therefore, if an estate is vested in trustees and their heirs, in trust for A. for life, with remainder in trust for the heirs of the body of A., A. takes an estate tail (*a*).

As to trusts executory,—equity may or may not follow the law.

But in the case of an *executory* trust, equity will not invariably construe with legal strictness the technical expressions in the document,—but will (in completing the executory trust) mould it according to the intention of the party; and it is only where no intention contrary to the legal effect appears, that equity construes the technical words of an executory trust in strict accordance with their legal meaning (*b*).

(*a*) *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 559.
(*b*) *Glenorchy* v. *Bosville*, Ca. t. Talb. 8.

Executory trusts are to be found either (1) In Marriage Articles, or (2) In Wills: And firstly, in the case of Marriage Articles, the very object of these (which is to provide for the issue of the marriage) is apparent on the face of the articles themselves; but secondly, in the case of Wills, the intention can only be gathered from the words the testator has used: If, therefore, by the Marriage Articles, real estate is settled upon the issue of the settlor, after an estate for life in the settlor, and in such terms as would give the settlor himself an estate tail,—thereby enabling him to defeat the provision intended for his issue,—Equity will, *in conformity with the presumed intention of the parties,* decree a settlement to be made upon the settlor for life only, with remainder to the issue of the marriage successively in tail as purchasers. For example, in *Trevor* v. *Trevor* (*c*), where A., in consideration of a then intended marriage, covenanted with certain trustees to *settle* an estate to the use of himself for life, with remainder to the use of his intended wife for life, with remainder to the use of the heirs male of him on her body begotten (and the heirs male of such heirs male issuing), with remainder to the use of the right heirs of the settlor for ever,—Lord Macclesfield said, that the articles were only "*Heads of Agreement,*"—and were to be moulded so as to effectuate the intention; and accordingly, he held, that A. was entitled to an estate for life only, with remainder to A.'s wife for her life; and that the eldest son (who, by contracting a low marriage, had incurred his father's displeasure) took by purchase, as tenant in tail in remainder,—so that A. (not being himself the tenant in tail, as he erroneously supposed himself to be) could not defeat the eldest son of his estate.

(a) Marriage articles,—intention always implied.

(b) Wills,—intention requires to be expressed.

(a) Executory trusts under Marriage Articles,—Court will decree a strict settlement in conformity with presumed intention.

But, in the case of Wills, where there is a devise to trustees, in trust *to convey* to A. for life, and after his decease to the heirs of his body; and there is nothing (*on the face of the will*) to show, that the issue of A. are to take as purchasers,—The rule of law will prevail, and A. himself will take the estate tail (*d*). On the other

(b) Executory trusts in wills,—Court seeks for the expressed intention.

Construed strictly, in the absence of an expressed in-

(*c*) 1 P. W. 622.
(*d*) *Sweetapple* v. *Bindon*, 2 Vern. 536.

tention to the contrary,—*Sweetapple* v. *Bindon.*

hand, if (*on the face of the will*) there are expressions which show that the testator intended a strict settlement, the Court will effectuate that intention. For example,

Construed according to contrary intention,—if expressed,—*Papillon* v. *Voice.*

in *Papillon* v. *Voice* (*e*), where A. bequeathed a sum of money to trustees in trust *to be laid out* by them in the purchase of lands, and directed the lands *to be settled* on B. for life, with remainder to the heirs of the body of B., with remainder over, and *with power to* B. *to make a jointure;* [and (by the same will) A. *devised lands* to B. for life with remainder to the heirs of the body of B., with remainder over],—Lord Chancellor King declared (firstly), that as regards the lands devised to B. for life, with remainder to the heirs of the body of B., the words operated as words of limitation, creating an estate tail in B.; but (secondly) that as regards the lands to be purchased and thereafter to be settled, these should be limited to B. for life only, with power in him to make a jointure, with remainder to B.'s first and other sons in tail male successively. And it will have been observed, that the already acquired lands devised by the will were so devised upon an *executed* trust,—so that the Rule in *Shelley's case* could not but apply; but that the lands *to be purchased,* and then afterwards *to be settled,* devised by the will, were so devised upon an *executory* trust,—so that the Court was free (as regards these latter lands) to apply (or not to apply) the Rule in *Shelley's case,* according as it found (or did not find) *in the will itself* some reference to a marriage (or some other indication of an intention contrary to the strict legal meaning of the words).

(a) The executed use.

(b) The executory use.

(*B*) *Secondly, Voluntary Trusts and Trusts for Value.*

(*B*) *Voluntary Trusts and Trusts for Value.*

For the due understanding of the distinction between these two classes of trusts, there are three general rules to be borne in mind, that is to say:—

General rules. (1) *Ex nudo pacto non oritur actio,*—"No action lies

Firstly, the rule,—*Ex nudo pacto non oritur actio,*—that no action lies upon an agreement without consideration,—Which rule is as universally recognised in equity

(*e*) 2 P. W. 471.

as it is at law. And (*e.g.*) in *Jefferys* v. *Jefferys* (*f*), where a father by voluntary deed conveyed certain freeholds and *covenanted to surrender* certain copyholds to trustees, in trust for his daughters; and he afterwards devised the same freehold and copyhold estates to his widow by a will dated subsequently to Preston's Act, 1815 (*g*),—So that the will (regarded as an assurance) was complete not only as to the freehold lands but also as to the copyhold lands, while the deed (regarded as an assurance) was complete as to the freeholds but incomplete as to the copyholds,—In a suit instituted by the daughters after the testator's death, to have the trusts of the deed carried into effect, and to compel the widow to surrender to them the copyholds to which she had meanwhile been admitted,—The Lord Chancellor said, that the title of the daughters to the freeholds was "complete, and being first in date was also first in right; but with respect to the copyholds, *the Court would not execute a voluntary contract*,"—*Scil.*, would not decree the widow to surrender the copyholds to the daughters: And accordingly, the widow kept the copyholds, but the daughters got the freeholds.

upon an agreement without consideration."

Secondly, the rule,—That an imperfect conveyance is (in equity) regarded as a CONTRACT to convey,—Which contract is binding or not binding as the case may be,—That is to say, (1) An imperfect conveyance, if for valuable consideration, is binding; but (2) An *imperfect* conveyance, *if voluntary*, is not binding: In other words, (1) A conveyance *for value* is binding, although imperfect; but (2) A *voluntary* conveyance is not binding, if imperfect (*h*).

(2) Imperfect conveyance,—evidence of a contract.

And Thirdly, the rule,—That a voluntary conveyance, *if perfect*, will be *binding* (*i*): Wherefore, in *Ellison* v. *Ellison* (*k*), Lord Eldon said,—"If you want the assistance of the Court to *constitute* you a *cestui que trust*, and the instrument is *voluntary*, you shall not have that

(3) Trust may arise without consideration.

(*f*) Cr. & Ph. 138.
(*g*) 55 Geo. III. c. 192.
(*h*) *Ross's case*, 34 Ch. D. 43; *Hardinge* v. *Cobden*, 45 Ch. D. 470.
(*i*) *Jefferys* v. *Jefferys*, *supra*; *Paul* v. *Paul*, 20 Ch. D. 742.
(*k*) 6 Ves. 656.

assistance,"—Implying that, if you are already completely "*constituted,*" then you may (although you are a volunteer) enforce your rights under the deed.

Has relation of *cestui que trust* been constituted?

And it will be found, in fact, that all the cases which have been decided on voluntary trusts, whether in favour of or against the volunteers, have turned upon this single inquiry,—Has the trust been completely constituted? Because if so, it is binding; and if not so, it is no good at all, *even as a ground of action for completely constituting it.*

I. Donor, both legal and equitable owner,—(a) Trust complete: (1) By conveyance upon trust; (2) By declaration of trust.

Therefore, Firstly, if the conveyance upon trust for the donee has been actually and effectually made, equity will enforce the trust even in favour of a volunteer, as against not only the donor himself, but also as against all subsequent volunteers. And the rule is the same, where the donor simply declares himself a trustee of the property for the donee,—Because, note, that in *Jefferys* v. *Jefferys, supra,* the voluntary deed (which contained the covenant to surrender) did not contain any such declaration of trust; but if it had contained such a declaration (additional to the covenant to surrender) it would have been a perfect document (*l*).

(b) Trust not complete, because,—(1) no declaration of trust; (2) an incomplete conveyance upon trust.

But, Secondly, where there is no declaration of trust, in fact,—nor any intention of declaring a trust,—but only an attempted legal conveyance which is imperfect, the intended trust will fail (*m*). And in one case (*n*), the mere failure of the voluntary assignor (of certain turnpike bonds) to *observe the formalities required* (*by the Turnpike Road Act*) for the complete efficacy of the assignment, was held fatal.

Where the property purporting to be assigned was such that it could not be completely transferred at law, the rule was, that the purported conveyance or assignment of it was good, *if the donor had done all that he could to perfect the assignment:* For example, in *Fortescue* v. *Barnett* (*o*), where J. B. by deed assigned his life policy

(*l*) *Steel* v. *Walker*, 28 Beav. 466.
(*m*) *Antrobus* v. *Smith*, 12 Ves. 39.
(*n*) *Searle* v. *Law*, 15 Sim. 95.
(*o*) 3 My. & K. 36.

for £1,000 to trustees, upon trust for the benefit of his sister and her children; and he duly delivered the deed to the trustees, but kept the policy in his own possession; and (no notice of the assignment having meanwhile been given to the office) J. B. afterwards for value surrendered the policy to the office,—Upon a bill filed by the trustees of the deed against the executors of J. B. (then deceased), to have the value of the policy replaced out of his estate,—The Court held, that (upon the delivery of the deed) *no act remained to be done by the grantor to give effect* (*Scil.*, as against himself) *to the assignment of the policy*,—and his estate was liable, therefore, to make good the value of the policy assigned by the deed. And in the somewhat similar case of *Pearson* v. *Amicable Assurance Office* (*p*), the Court arrived at the same conclusion,—viz., that the assignment, *being by* DEED, was complete, and the gift perfect and binding. Also, where a husband assigned leaseholds (*q*), or assigned ground rents (*r*) to his wife, without the intervention of a trustee, and the assignment was by DEED,—The Court held, that the assignment was complete, although (by the then state of the law) it left the husband still possessed of the legal estate,—that defect *not being a neglect of the party*.

But, although (as regards furniture and other chattels which are of a nature to admit of delivery) a gift by a husband to his wife by delivery merely (and without any deed), may be good (*s*), still, a mortgage debt cannot be effectually given by the mere delivery of the title deeds (*t*), nor a bond debt by the mere delivery of the bond (*u*),—a DEED being necessary in all such latter class of cases. But an assignment which is incomplete in the first instance may afterwards operate as a complete assignment,—as where (*e.g.*) the imperfect donee is appointed the voluntary donor's executor (*x*),—or even one of his executors (*y*),—but not invariably so (*z*). Also, an

(*p*) 27 Beav. 229.
(*q*) *Fox* v. *Hawks*, 13 Ch. D. 822.
(*r*) *Baddeley* v. *Baddeley*, 9 Ch. D. 113.
(*s*) *Grant* v. *Grant*, 34 Beav. 623.
(*t*) *Shillito* v. *Hobson*, 30 Ch. D. 396.
(*u*) *Edwards* v. *Jones*, 1 My. & Cr. 226.
(*x*) *Strong* v. *Bird*, L. R. 18 Eq. 315; *Griffin* v. *Griffin*, 1899, 1 Ch. 408.
(*y*) *Stewart* v. *McLaughlin*, 1908, 2 Ch. 251.
(*z*) *In re Innes*, *Innes* v. *Innes*, 1910, 1 Ch. 188.

assignment of a mortgage debt (if the assignment is by deed) will be a complete assignment in the first instance even, although the security for the mortgage debt should not be also assigned by the deed (*a*).

II. Donor only equitable owner,—
(a) Trust complete:
(1) By direction to trustees to hold in trust;

Where, in any of the above cases, the donor or settlor has only the equitable estate or interest in the property, if he directs the trustees (in whom the legal estate is), to hold the property in trust for the donee, a trust is well and irrevocably created (*b*),—the direction only requiring to be in writing as regards lands (whether freeholds, leaseholds, or copyholds); and for the validity of a trust so created, no notice of the direction need be given to the trustees,—such notice being only necessary as against third parties. Also, if the donor or settlor (having only the equitable estate or interest in the property) *assigns* his equitable interest in the property,—in the case of lands, by conveying his equitable interest therein; and in the case of personalty, by assigning his equitable interest therein,—*and a* DEED *is used*,—that will make a complete gift, as regards both lands (*c*) and goods (*d*).

(2) By conveyance upon trust.

Summary of the law.

The whole law as to voluntary trusts may be summarised as follows:—In order to render a voluntary settlement valid and effectual, the donor or settlor must have done everything which (according to the nature of the property comprised in the gift or settlement) was necessary to be done in order to transfer the property; and he may do this either (1) by actually transferring the property to the persons for whom he intends to provide, or to a trustee for them; or (2) by declaring himself a trustee of the property for these persons. But in order to render a voluntary settlement binding, one or other of these modes must be resorted to,—*Scil.*, because there is no equity *to perfect an imperfect gift;* and where the intention is to transfer the property (and not to declare a trust of it), the Court will not treat the imperfect transfer as a de-

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(*a*) *Bills* v. *Tatham*, 1891, 1 Ch. 82.
(*b*) *Bill* v. *Cureton*, 2 My. & K. 503.
(*c*) *Gilbert* v. *Overton*, 2 H. & M. 110.
(*d*) *Kekewich* v. *Manning*, 1 De G. M. & G. 176.

claration of trust,—merely for the purpose of completing the gift in favour of the volunteer (*e*).

(*C*) *Fraudulent Trusts.*

Frauds may arise, either at the common law (*f*) or under the provisions of some statute,—the statute being sometimes merely declaratory of the common law, and being sometimes either additional thereto or altogether new:—

(a) By the 13 Eliz. c. 5, all (covinous) alienations of lands or goods, whereby *creditors* may (in respect of such lands or goods) be in any wise delayed in (or defrauded of) their just rights, are declared (*as against such creditors*) utterly void; and the void conveyance may be either voluntary or for value:— (a) 13 Eliz. c. 5,—frauds under.

(1) And, Firstly, as regards Voluntary Conveyances:— The statute 13 Eliz. c. 5, does not declare voluntary conveyances *as such* to be void, but only fraudulent voluntary conveyances (*g*); but a voluntary conveyance *which tends either to defeat or to delay the creditors* of the settlor generally (*h*), or one particular creditor even (*i*), is fraudulent within the statute. The mere fact of the settlor being indebted at the time of the voluntary conveyance, is not, however, sufficient of itself to invalidate the conveyance,—*unless the remedy of the then existing creditor or creditors is defeated or delayed by the existence of the settlement* (*k*); and as regards creditors *subsequent* to the date of the settlement, these can only defeat the settlement (*being voluntary*), if they can show, that their money has been, in fact, applied towards paying the creditors who were in existence at the date of the settlement: In which latter case, the subsequent creditors will have a right to "*stand in the shoes*" of the previously existing creditors (*l*); and any creditor of a deceased insol- (1) Voluntary conveyances. Settlor being indebted does not *per se* invalidate conveyance,—unless the then existing creditors are defrauded.

(*e*) *Milroy* v. *Lord*, 4 De G. F. & J. 264; *Richards* v. *Delbridge*, L. R. 18 Eq. 11.
(*f*) *Twyne's case*, 3 Rep. 80; *Edwards* v. *Harben*, 2 T. R. 587.
(*g*) *In re Lane Fox*, 1900, 2 Q. B. 508.
(*h*) *Ideal Bedding Co.'s case*, 1907, 2 Ch. 157.
(*i*) *Edmunds* v. *Edmunds*, 1904, P. 362.
(*k*) *Spirett* v. *Willows*, 34 L. J. Ch. 367.
(*l*) *Freeman* v. *Pope*, L. R. 5 Ch. 538.

vent may in this way avoid the voluntary settlement,—suing (in such a case) on behalf of himself and all the other creditors of the deceased (*m*); and, in such a case, the fraudulent donee appears to be liable as an executor *de son tort*.

What amount of indebtedness will raise presumption of fraudulent intent within the meaning of 13 Eliz. c. 5.

Mere indebtedness not sufficing to raise the presumption of a fraudulent intent,—it must be shown, that "the settlor was at the time so largely indebted, as to induce the Court to believe, that the intention of the settlement was to defraud his creditors" (*n*). But a *liability* which has not yet ripened into a debt, may (*being proximate*) require to be provided for, if the settlement is to stand (*o*), —*Scil.*, where the liability arises out of some pre-existing contract, but not where it arises out of a tort (*p*). Also, if the liability is prospective, in the sense that the debtor is contemplating some new venture in trade (which may or may not issue successfully), that is a proximate liability which must be taken into account (*q*).

(2) Conveyances for value.

(2) Secondly, as regards Conveyances for Value:—These may be either (1) Mortgages, or (2) Sales. And, firstly, as regards Mortgages,—These may be either of the whole (or substantially of the whole) property of the debtor, or of part only of the property; and they may be in consideration either of a past advance (with or without some further present advance), or wholly in consideration of a present advance. And it appears, that where the debtor assigns the *whole* of his property by way of security for a *past* debt only, it is an act of bankruptcy, whatever the motives of the parties may have been (*r*); but if (in such a case) there is also a present advance, or if the assignment is wholly by way of security for a present advance, it is then a question of the intention of the parties (*s*),—which may be *bonâ fide* enough. And,

Conveyance, when fraudulent and when not.

(*m*) *Richardson* v. *Smallwood*, Jac. 552; *Kingston Cotton Co.* v. *Mouat*, 1899, 1 Ch. 831.
(*n*) *Holmes* v. *Penney*, 3 K. & J. 90.
(*o*) *Ridler* v. *Ridler*, 22 Ch. D. 74.
(*p*) *Lewknor* v. *Freeman*, 1 Eq. Ca. Abr. 149.
(*q*) *Mackay* v. *Douglas*, L. R. 14 Eq. 106.
(*r*) *In re Jukes*, 1902, 2 K. B. 58.
(*s*) *Godfrey* v. *Poole*, 13 App. Ca. 497, on p. 503.

Secondly, as regards Sales,—When the conveyance is for value AND is *bonâ fide*, the deed is not fraudulent,—*Scil.*, unless *mala fides*, on the parts of *all* the parties to it, be shown (*t*).

Subsequent purchaser for value protected.

If the person entitled under the settlement should, before the settlement is avoided, have conveyed away (or even charged) for a valuable consideration his estate or interest thereunder, then, *to the extent of such conveyance (or charge)*, the settlement will remain good (*u*); And, apparently, a settlement which is (in the first instance) voluntary may, by matter *ex post facto*, become a settlement for value,—equally as if it had been originally for value (*x*).

The trustee of the settlement (where he is an honest trustee) is always entitled to be paid out of the settled property his costs (and charges properly incurred) of defending the action to upset it (*y*),—Because, of course, the settlement (as between the parties to it) is and remains valid, subject only to the debts being paid (*z*); but if the Court should have decided against the validity of the settlement, and the trustee appeals, he does so at his own risk (*a*).

(b) 27 Eliz. c. 4,—frauds under.

(b) By the 27 Eliz. c. 4,—which statute has now been (in effect) repealed,—every conveyance of (or charge upon) lands, with the intent to defraud such persons, &c., as should afterwards *purchase* the lands, was to be deemed (*as against such purchasers*) to be wholly void, frustrate, and of none effect. And upon the words of this statute, it was held, that a voluntary settlement of lands (whether freehold, copyhold, or leasehold) was void as against a subsequent purchaser of the lands for value, even although such purchaser had purchased with full notice of the voluntary settlement (*b*); and the very exe-

Voluntary settlement formerly void against subsequent purchaser.

(*t*) *Gale* v. *Williamson*, 8 Mee. & W. 405; *Kevan* v. *Crawford*, 6 Ch. D. 29; and *Golden* v. *Gillam*, 20 Ch. Div. 389.
(*u*) *In re Vansittart*, 1893, 2 Q. B. 377.
(*x*) *Prodgers* v. *Langham*. Sid. 133.
(*y*) *In re Holden*, 20 Q. B. D. 43.
(*z*) *Curtis* v. *Price*, 12 Ves. 89.
(*a*) *Ex parte Russell, In re Butterworth*, 19 Ch. D. 588.
(*b*) *Doe* v. *Manning*, 9 East, 59.

cution of the subsequent conveyance sufficiently evinced (it was said) the fraudulent intent of the former one. And yet the settlement was good enough *as against the grantor* himself (*c*),—who, therefore, could not (*d*),—although the purchaser from him might (*e*),—have compelled specific performance.

Chattels personal were not within the statute.

Chattels personal, however, were not within the statute; and a voluntary settlement of chattels personal was, therefore, not defeated by their subsequent sale (*f*); and as regards leasehold properties, if these were subject to a rack rent and to onerous covenants, and the volunteer undertook the liability for these, the settlement was not fraudulent within the statute (*g*).

Purchaser,—who?

A mortgagee (*h*), and likewise a lessee, were esteemed purchasers *pro tanto* within the meaning of the statute; but a judgment creditor was not so (*i*): And when it was said, that a mortgagee or lessee was a purchaser *pro tanto*, it was meant and intended, that the mortgage or lease prevailed over the voluntary settlement, *to the extent required to give full effect to the mortgage or lease;* and (subject to such mortgage or lease) the voluntary settlement remained, of course, good.

Subsequent purchase must have been from the very settlor himself, and express or direct.

But a *bonâ fide* purchaser for value from the heir-at-law (or from the devisee of the voluntary settlor) was not within the statute; nor was a *bonâ fide* purchaser for value from one claiming under a second voluntary conveyance (*k*),—*Scil.*, because the intermediary vendor in all these cases was but a volunteer himself,—and, therefore, could not (by selling) convey a better or higher estate than he himself had. Also, the person who claimed by virtue of the statute to set aside a prior voluntary settlement, must have claimed under and through the

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(*c*) *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275.
(*d*) *Smith* v. *Garland*, 2 Mer. 123.
(*e*) *Daking* v. *Whimper*, 26 Beav. 568; *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84.
(*f*) *M'Donnell* v. *Hesilrige*, 16 Beav. 346.
(*g*) *Price* v. *Jenkins*, 5 Ch. Div. 919; *Harris* v. *Tubb*, 42 Ch. Div. 79.
(*h*) *Cracknall* v. *Janson*, 11 Ch. Div. 1.
(*i*) *Beavan* v. *Earl of Oxford*, 6 De G M. & G. 507.
(*k*) *Doe* v. *Rusham*, 17 Q. B. 723; *Lewis* v. *Rees*, 3 K. & J. 132.

voluntary settlor himself, and through or under no other person whatsoever (*l*); and such claim must have been directly and proximately through or under the settlor, and not indirectly or by inference of law or rule of equity (*m*).

Volunteers,—their right to the purchase-money.

Where the voluntary settlement was set aside in favour of a subsequent purchaser, the volunteers had no right to the specific purchase-money (*n*); but if the settlement had contained a covenant for quiet enjoyment, the settlor would have been liable thereon for damages, amounting to (in effect) the specific purchase-money (*o*): Therefore, *to the extent of any subsequent mortgage of the property effected by the* voluntary settlor, he (and after his death his estate) would have been liable on the settlor's covenant for quiet enjoyment (*p*),—and also, *semble*, on his covenant for further assurance (*q*): Also, if the persons entitled under the voluntary settlement should, before any subsequent sale or mortgage of the property by the settlor, have conveyed away (or charged) for a valuable consideration, their estate or interest under the settlement, then (*to the extent of such conveyance or charge*) the settlement remained good (*r*); and the settlement might also (by reason of matters *ex post facto*) have become a settlement for value (*s*).

Volunteers,—their power to alienate or charge.

Voluntary Conveyances Act, 1893,—effect of.

But all these decisions upon the 27 Eliz. c. 4, have been now deprived (in large measure) of their importance, it having been enacted, by the Voluntary Conveyances Act, 1893 (*t*), that (save as regards subsequent purchasers, mortgagees, and lessees who have become such before the 29th June, 1893) no voluntary conveyance, which shall have been in fact made without any *actual* fraudulent intent, shall be deemed fraudulent and void within the meaning of the 27 Eliz. c. 4,—So that, now, a voluntary

(*l*) *Godfrey* v. *Poole*, 13 App. Ca. 497.
(*m*) *In re Walhampton Estate*, 26 Ch. Div. 391.
(*n*) *Daking* v. *Whimper*, 26 Beav. 568.
(*o*) *Dolphin* v. *Aylward*, L. R. 4 H. L. 486.
(*p*) *Hales* v. *Cox*, 32 Beav. 118.
(*q*) *Mallott* v. *Wilson*, 1903, 2 Ch. 494.
(*r*) *In re Carter and Kenderdine*, 1897, 1 Ch. 776.
(*s*) *George* v. *Milbanke*, 9 Ves. 890.
(*t*) 56 & 57 Vict. c. 21.

settlement of *real* estate is as favourably situated as a voluntary settlement of pure *personal* estate.

Considerations are either,—(1) Meritorious; Or (2) Valuable.

And it may be conveniently noted here, that lawful considerations are either (1) Meritorious considerations (sometimes called *good* considerations),—being considerations of blood and natural affection, or of generosity and moral duty; or (2) Valuable considerations,—such as *money, marriage,* or the like, which the law esteems an equivalent for money. And, as regards the consideration of marriage, that has always been recognised as a valuable one; and previously to the Statute of Frauds, a mere *oral* promise by the intended husband, to settle property upon the intended wife, was upheld by the subsequent marriage; and the Statute of Frauds (29 Car. II. c. 3), s. 4, did not alter that principle, but only required (*by way of evidence*) that the ante-nuptial agreement should be in writing. In the case, therefore, of an ante-nuptial *written* agreement *followed by marriage,* the wife is esteemed a purchaser for value (*u*); and an ante-nuptial *parol* agreement, subsequently embodied in and evidenced by a post-nuptial settlement made in pursuance of that agreement, *and in which the ante-nuptial agreement is specifically recited,* appears also to hold good as a purchase for value (*x*),—it being sufficient, if the written evidence is forthcoming before action brought (*y*),—*Scil.*, where there is no *actual* intention of fraud (*z*).

Marriage consideration under 27 Eliz. c. 4.

Post-nuptial settlement in pursuance of ante-nuptial parol agreement.

Bonâ fide post-nuptial settlement supported on slight consideration.

Even before the Voluntary Conveyances Act, 1893, a Court of Equity supported post-nuptial settlements on very slight valuable consideration. For example, a small advance of money by some third party, *as an inducement to the husband to settle his freeholds on his wife and children,* was deemed sufficient (*a*). Also, in *Hewison* v. *Negus* (*b*), it was decided, that, if the wife's real estate (of which her husband would be entitled for his life to receive the rents and profits) was settled by post-nuptial

(*u*) *Kirk* v. *Clark*, Prec. in Ch. 275.
(*x*) *Dundas* v. *Dutens*, 2 Cox, 235; *Montacute* v. *Maxwell*, 1 P. Wms. 617.
(*y*) *Bailey* v. *Sweeting*, 9 C. B. N. S. 843.
(*z*) *Gregg* v. *Holland*, 1902, 2 Ch. 360.
(*a*) *Bayspoole* v. *Collins*, L. R. 6 Ch. App. 228.
(*b*) 16 Beav. 564.

settlement on the wife for life (for *her separate use*), with remainder to the children, the post-nuptial settlement was not void (under the statute 27 Eliz. c. 4) as against a subsequent *purchaser* from the husband and wife,—*Scil.*, because the husband had (in effect) purchased for his children by giving up his own life estate; and in *Teasdale* v. *Braithwaite* (*c*), the like decision under the like circumstances was given against a subsequent mortgagee of the husband and wife. On the other hand, in *Shurmur* v. *Sedgewick* (*d*), where the property (freehold and leasehold) was already the separate estate of the wife,—So that the husband had nothing in it to give up,—the post-nuptial settlement was declared to be wholly void as against a subsequent mortgagee of the husband and wife.

Malâ fide præ-nuptial settlement not supported.

But, *nota bene*, where there is *actual* fraud, even an ante-nuptial voluntary settlement, for which the marriage is the sole consideration on the part of the wife, will not be supported as against a subsequent purchaser or mortgagee, if the marriage (although technically legal) is altogether illusory as a consideration. For example, in *Columbine* v. *Penhall* (*e*), where a gentleman went through the ceremony of marriage with a female who had previously lived with him in concubinage for a period of years; and he settled considerable property upon her, *prior to and in purported consideration of the marriage*, —The Court, being of opinion that the marriage was illusory *as a consideration*, and that the female knew it, set aside the settlement as fraudulent against the subsequent *purchaser;* and in *Bulmer* v. *Hunter* (*f*), where the circumstances were similar, the purported ante-nuptial settlement was set aside under the 13 Eliz. c. 5, as a fraud on the creditors. But if the female had been innocent of any fraudulent intent, her interests under the settlement would have remained good (*g*).

Who are within the scope of the marriage consideration.

Upon the question, How far the marriage consideration extends:—It appears, that a limitation to the issue of

(*c*) 5 Ch. Div. 630.
(*d*) 24 Ch. Div. 597.
(*e*) 1 Sm. & Giff. 228.
(*f*) L. R. 8 Eq. 46.
(*g*) *Campion* v. *Cotton*, 17 Ves. 264; *Kevan* v. *Crawford*, 6 Ch. D. 29.

the settlor by a prospective second marriage is *not* defeasible as voluntary, where the other limitations (which in themselves are for value) would also be defeated if such first-mentioned limitation were defeated (*h*); and (for the like special reason) a settlement on her marriage, made by a woman of her own property as a provision for her illegitimate children, has been upheld as against a subsequent mortgagee (*i*),—as also a settlement made by her in favour of her lawful children by a former marriage (*k*); but (save for such special reason as aforesaid) it rather appears, that all these limitations would be merely voluntary (*l*). Apparently also, the like settlement by a widower, in favour of his children by a former marriage is merely voluntary (*m*); and a limitation to the brothers of the settlor (or to more distant collaterals) is voluntary (*n*),—they not being purchasers in any sense (*o*); but limitations in favour of collaterals will be supported, if there is any party to the settlement who *bonâ fide* purchases on their behalf (*p*). Also, in the case of "*family arrangements*," all the persons within the scope of them are deemed purchasers for value (*q*); and mere "*forbearance*" will sometimes make you a purchaser for value (*r*).

(c) The Bills of Sale Acts, 1878, 41 & 42 Vict. c. 31, and 1882, 45 & 46 Vict. c. 43,—frauds under.

(c) By the Bills of Sale Acts, 1878 and 1882 (*s*), a very factitious species of fraud has been introduced,—for the protection primarily of the general creditors of the grantor, and secondarily (since 1882) for the protection of the grantor himself; but as the provisions of these Acts are epitomised in Chapter xviii. *infra*, it is sufficient here to mention, that the Act of 1878 (like the Bills of Sale Acts of 1854 and 1866, which it repealed) expressly exempts marriage settlements from its operation,—an exemption which extends, however, only to ante-

(*h*) *De Mestre* v. *West*, 1891, A. C. 264.
(*i*) *Clark* v. *Wright*, 6 H. & N. 849.
(*k*) *Newstead* v. *Searles*, 1 Atk. 265.
(*l*) *Att.-Gen.* v. *Jacobs Smith*, 1895, 2 Q. B. 341.
(*m*) *In re Cameron and Wells*, 37 Ch. Div. 32.
(*n*) *Stackpoole* v. *Stackpoole*, 4 Dru. & Warr. 320.
(*o*) *Johnson* v. *Legard*, 3 Madd. 283.
(*p*) *Hance* v. *Harding*, 20 Q. B. D. 732.
(*q*) *Heap* v. *Tonge*, 9 Hare. 90.
(*r*) *Dicksee's case*, 1908, 2 K. B. 169; *Wigan's case*, 1909, 1 Ch. 291.
(*s*) 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43.

nuptial (and not also to post-nuptial) settlements (*t*) or agreements for settlements (*u*): And in connection with all these last-mentioned settlements and agreements for a settlement, it is to be observed, as regards the 20th section of the Act of 1878, whereby the chattels comprised in any bill of sale, which has been (and which continues to be) duly registered, are (by force of the registration) taken out of the possession, order, and disposition of the grantor of the bill within the meaning of the Bankruptcy Act (*x*), —that although that section has been repealed by the 15th section of the Act of 1882 as regards bills of sale given by way of security for money lent, still the section remains in full force as regards *absolute* assignments (including post-nuptial settlements and agreements for a settlement (*y*)),—not being settlements of or comprising the goods of a *trader* (*z*).

(d) By the Bankruptcy Act, 1883 (*a*), s. 47 (repealing but re-enacting, and extending to *non-traders* as well as to *traders*, a similar provision contained in the Bankruptcy Act, 1869 (*b*), s. 91),—The following provisions have been made, but with reference only to *voluntary* settlements, and not so as to affect settlements for value (being either marriage or other *commercial value* (*c*)), that is to say:—

(d) The Bankruptcy Act, 1833, s. 47,—frauds under.

(1) Voluntary settlements.

Firstly, with reference to the husband's property in his own right—

(a) Of husband's own property.

(1) Any settlement made within two years of the subsequent bankruptcy of the settlor is, *ipso facto*, void upon the bankruptcy (*Scil.*, as against the trustee in the bankruptcy (*d*)); and

(2) Any settlement made within ten years of the subsequent bankruptcy of the settlor, and outside the first two of such ten years, is also void upon the bankruptcy (*Scil.*, as against the trustee in the bankruptcy),—unless

(*t*) *Ashton* v. *Blackshaw*, L. R. 9 Eq. 510.
(*u*) *Wenman* v. *Lyon*, 1891, 2 Q. B. 192.
(*x*) Bankruptcy Act, 1883, s. 44.
(*y*) *Swift* v. *Pannell*, 24 Ch. Div. 210.
(*z*) *In re Ginger*, 1897, 2 Q. B. 461.
(*a*) 46 & 47 Vict. c. 52.
(*b*) 32 & 33 Vict. c. 71.
(*c*) *In re Parry*, 1904, 1 K. B. 129.
(*d*) *In re Tankard*, 1899, 2 Q. B. 57.

and until (in this latter case) the *cestuis que trustent* under the settlement prove, that the same was not in fact fraudulent as against the creditors of the settlor, and prove also that the interest of the settlor in the property passed to the trustees of the settlement on the execution thereof. And it has been held, on the construction of these provisions, that the settlement is not void *until there is a trustee in the bankruptcy*,—So that any *bonâ fide* alienation in the meantime, whether by way of sale (*e*) or by way of mortgage (*f*), of the property comprised in the settlement, is and remains good. Also, if the settlor, instead of conveying the property to trustees, declares *himself* a trustee of it, that is enough, to make the property pass (*g*).

(b) Of wife's property.

Secondly, with reference to the husband's property in right of his wife,—Any settlement on the wife and children of the settlor is good (no matter how soon the bankruptcy of the settlor may thereafter come about), provided it be of property that has accrued to the settlor through his wife during the coverture (*h*). Also, in all cases, the property or money of the wife, received by the husband and afterwards settled by him, is deemed to have been settled by *her* (and not by *him* (*i*)).

Valid settlement,—Limitation in, until settlor's bankruptcy or assignment,—validity or invalidity of and operation of.

And it may be conveniently noted here, that where (by a valid settlement) the property of the husband is limited to him for his life, or until his bankruptcy or assignment (voluntary or involuntary), with remainder over, the limitation until bankruptcy is void (*k*), but the limitation until assignment (whether voluntary (*l*) or involuntary (*m*)) is good,—So that, if there is a bankruptcy simply, the trustee in the bankruptcy will take the life estate: But if there is (first) an assignment and then (afterwards) a bankruptcy, the gift over in remainder has meanwhile taken effect on (and by reason of) the

(*e*) *In re Carter and Kenderdine*, 1897, 1 Ch. 776.
(*f*) *Sanguinetti* v. *Stuckey's Bank*, 1895, 1 Ch. 176.
(*g*) *Shrager* v. *March*, 1908, A. C. 402.
(*h*) *Mackintosh* v. *Pogose*, 1895, 1 Ch. 505.
(*i*) *Whitmore* v. *Mason*, 2 J. & H. 204; *Mackintosh* v. *Pogose*, *supra*.
(*k*) *Wilson* v. *Greenwood*, 1 Sw. 471.
(*l*) *Higinbotham* v. *Holme*, 19 Ves. 88; *Brooke* v. *Pearson*, 27 Beav. 185.
(*m*) *Detmold* v. *Detmold*, 40 Ch. D. 585.

assignment, and there is in that case nothing for the trustee in the bankruptcy to take (*n*): And where there has been (first) a bankruptcy, and the creditors in that bankruptcy have been paid (under some arrangement or provision made for them),—and then (afterwards) there is a second bankruptcy, the chances greatly are, that (in that case also) there will be nothing for the trustee in the second bankruptcy to take (*o*).

(1a) Covenants to settle.

With reference to covenants and contracts by any one (trader or not) to settle property of his own *yet to be acquired*,—All such covenants are void upon the subsequent bankruptcy of the covenantor,—Unless (prior to such bankruptcy) the property comprised in the covenant has been both acquired, and also settled, pursuant to the covenant (*p*); but where the after-acquired property is furniture or the like, it is well transferred (*i.e.*, settled) by delivery (*q*),—and the settlement is thereupon a complete ante-nuptial settlement (*r*). These covenants to settle, it is here to be observed, may be contained either in post-nuptial or in ante-nuptial settlements; and, firstly, when they are contained in voluntary post-nuptial settlements, even the children of the marriage cannot enforce them (*s*),—and still less the remote beneficiaries (*t*); but, secondly, when they are contained in ante-nuptial settlements, the children (issue of the marriage) are deemed covenantees, and so are entitled to (but strangers cannot) enforce the covenants to settle (*u*). And, *nota bene*, where the covenant to settle is to settle *after-acquired* property, no mere declaration of trust until the settlement will avail,—such declaration being merely incidental to the covenant, and falling with the covenant (*x*).

(2) Fraudulent preferences, &c.

By the Bankruptcy Act, 1883, s. 48, every conveyance of property (or charge thereon) made . by any per-

(*n*) *Hammonds* v. *Barrett*, 21 L. T. N. S. 321.
(*o*) *In re Johnson Johnson*, 1904, 1 K. B. 134.
(*p*) *In re Reis, Ex parte Clough*, 1905, A. C. 442.
(*q*) *In re Magnus, Ex parte Salaman*, 1910, 2 K. B. 1049.
(*r*) *W.* v. *L.*, 1891, 2 Q. B. 192.
(*s*) *Green* v. *Paterson*, 32 Ch. D. 95.
(*t*) *Joyce* v. *Hatton*, 11 Ir. Ch. Rep. 123.
(*u*) *Hill* v. *Gomme*, 5 My. & Cr. 250; *Gandy* v. *Gandy*, 30 Ch. Div. 57.
(*x*) *Chetwynd* v. *Morgan*, 31 Ch. Div. 596.

son unable to pay his debts as they become due from his own money, in favour of any creditor, *with the view of giving such creditor a* PREFERENCE *over the other creditors*, becomes void as a fraudulent preference, if the person making . . . the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making . . . the conveyance or charge. But these fraudulent preferences may, *semble*, be effectively made by a very easy evasion of the Bankruptcy Act,—it being sufficient (*e.g.*) to intend to prefer A. the surety, while in fact you prefer B. the creditor, or *vice versâ* (*y*); but the Court will be astute, of course, to prevent any such evasion (*z*).

(3) Acts of bankruptcy.

By the Bankruptcy Act (1883), s. 4, the three following conveyances by a debtor are also to be deemed fraudulent,—and even to be acts of bankruptcy,—that is to say:—(1) A conveyance or assignment of his (the debtor's) property, to a trustee or trustees for the benefit of his creditors generally;

(2) A *fraudulent* conveyance, gift, delivery, or transfer of his property (or of any part thereof); and

(3) Any conveyance, transfer, or charge which would (in any way) be void as a fraudulent preference, if the debtor was adjudged bankrupt; But

(4) Protected transactions.

(4) By s. 49 (being the section as to "*protected transactions*"), payments by the bankrupt to his creditors, and conveyances by the bankrupt for value, which respectively take place before the date of the receiving order, are to remain good, if (but only if) the creditor or conveyee had not (at the date of the payment or conveyance) notice of any available act of bankruptcy then already committed by the bankrupt (*a*),—Because, generally, the rules in bankruptcy, equally with the rules in use at the common law and in equity, must be consistent with common honesty,—and usually are so (*b*).

(*y*) *Stenotyper case*, 1901, 1 Ch. 250.
(*z*) *In re Jackson and Bassford*, 1906, 2 Ch. 467.
(*a*) *In re Dunkley*, 1905, 2 K. B, 683.
(*b*) *Ex parte James*, L. R. 9 Ch. App. 609; *In re Tyler*, 1907, 1 K. B. 865.

(*D*) *Trusts in Favour of Creditors.*

(*D*) *Trusts in favour of creditors.*

Although a complete conveyance upon trust (or a simple declaration of trust) in favour of *volunteers* is (as we have seen) irrevocable,—*Scil.*, unless where an express power of revocation is contained in it; yet where a debtor makes a complete transfer of his property (by deed) to a trustee, upon trust for the payment of his *creditors*, that amounts, in general, merely to a direction to the trustee as to the mode in which, for the benefit of the *debtor*, he (the trustee) shall apply the property,—So that the debtor may afterwards vary or revoke the trust at his pleasure. Therefore, in one case, where there had been an assignment of property to trustees for the payment of certain scheduled creditors, the Court said, that the real nature of the deed was an arrangement made by the debtor (for the payment of his debts) in an order prescribed by himself, and over which he retained the control (*c*); and, in another case (*d*), the Court said:—"If a debtor conveys property in trust for the benefit of his creditors, *and the creditors are not in any manner privy to the conveyance*, the deed merely operates as a power to the trustees, *which is revocable by the debtor*,—equally as if the debtor had delivered money to an agent to pay his creditors with, and (before any payment) had recalled the money."

Revocable in general by the debtor.

But where the so-called trust for creditors is not to arise until after the death of the settlor, it is not competent for any beneficiary or *cestui que trust* entitled under the will of the settlor to exercise the right of revocation (*e*),—*Scil.*, because such beneficiary or *cestui que trust* (being himself merely a *volunteer*) takes subject to the provision made by the settlor for the payment of his debts,—and that, whether the debts are specified in a schedule to the deed (*f*) or are not so specified (*g*). Also, such a deed may, even in the settlor's lifetime, be from

The right to revoke is personal to settlor.

(*c*) *Garrard* v. *Lauderdale*, 3 Sim. 1.
(*d*) *Acton* v. *Woodgate*, 2 My. & K. 495.
(*e*) *Fitzgerald* v. *White*, 37 Ch. Div. 18.
(*f*) *Synnot* v. *Simpson*, 5 H. L. Ca. 121.
(*g*) *Priestley* v. *Ellis*, 1897, 1 Ch. 489.

the first irrevocable,—constituting from the first (as between the settlor and the oreditors), the true relation of trustee and *cestuis que trustent* (*h*). Also, if the deed in favour of the creditors has been communicated to them, AND they *have been "induced thereby to a forbearance* in respect of their claims,"—*i.e.*, "*have assented to* (*and acquiesced in*) *the deed*" (*i*),—The deed becomes irrevocable. Also, if the creditor is a *party* to the deed, and executes it, the deed (*as to that creditor*) is irrevocable (*k*); and, usually, the creditors may execute the deed (or may accede to it) even after the time in that behalf specified in the deed has expired,—*the time so specified not being deemed of the essence* (*l*).

Effect of communication of deed to creditors, followed by forbearance on the faith of the deed.

Effect of the creditor being a party to the deed.

Surplus assets,—title to.

As regards the surplus assets (if any) which may remain after satisfying the primary purposes of the deed, these will, in general, result to the settlor (the debtor),—or (if he be dead) to his legal representative,—or (if the deed should have so provided) to the *cestui que trust* next entitled under the deed (*m*); but if the deed should, in any particular case, be (as it may be) an *absolute* disposition of the assets in favour of the creditors, there would, of course, be no surplus assets at all,—nor any resulting trust (*n*),—in such a case.

And regarding these trust deeds for creditors, these three further points require to be here noticed, namely:—

Effect of claiming adversely to the deed.

Firstly, a creditor who for a long time delays to execute the deed (*o*), or who sets up a title adverse to it (*p*), will not be allowed to claim the benefit of it, nor may the deed (if *bonâ fide*) be challenged by him (*q*),—save in the event of the bankruptcy of the debtor (*r*).

Stock Exchange assignments,—effect of.

Secondly, an assignment (in the case of a Stock Exchange debtor) to the Stock Exchange official assignee,

(*h*) *Sharp* v. *Jackson*, 1899, A. C. 419.
(*i*) *Acton* v. *Woodgate*, *supra*; *Biron* v. *Mount*, 24 Beav. 649.
(*k*) *Mackinnon* v. *Stewart*, 1 Sim. N. S. 88.
(*l*) *Whitmore* v. *Turquand*, 3 De G. F. & J. 107.
(*m*) *Salt* v. *Northampton*, 1892, A. C. 1.
(*n*) *Cooke* v. *Smith*, 1891, App. Ca. 297.
(*o*) *Gould* v. *Robertson*, 4 De G. & Sm. 509.
(*p*) *Meredith* v. *Facey*, 29 Ch. Div. 745.
(*q*) *Maskelyne and Cooke's case*, 1903, 1 K. B. 671.
(*r*) *In re Mills*, 1906, 1 K. B. 389.

—which assignment is for the benefit exclusively of the Stock Exchange creditors,—is and remains valid, as against the creditors generally of the debtor (*s*),—unless and until (the debtor being made a bankrupt) it is set aside as a fraudulent preference of the particular class of creditors (*t*).

Trust deeds for creditors,—are (for three months after the date of execution by the debtor) unworkable things.

And, Thirdly, all these trust deeds in favour of creditors are (in effect) "Deeds of Arrangement,"—and (as such) are acts of bankruptcy on the part of settlors,—So that the trust deed is (*and for three months after its date* continues to be) available as an act of bankruptcy on which any creditor may make the settlor a bankrupt,—Excepting that none of the creditors who have assented to the deed (or who have executed it), could make the settlor a bankrupt on that ground alone (*u*). Also, no payment can be safely made to the trustee of such a deed,—*during the period of three months during which it is and continues to be an available act of bankruptcy* (*x*): Furthermore, these trust deeds, being "Deeds of Arrangement," must (like bills of sale are registered) be registered within seven days of their first execution,—or else they are void (*y*); and if and so far as they comprise lands of any tenure, they must be registered also in the Land Registry Office, in the proper register for such deeds (*z*), —or else they will be void as against a subsequent purchaser or mortgagee or lessee of the debtor. But as regards such deeds when executed by a foreigner domiciled abroad, they are not (except, of course, as regards lands in England) within the purview of the Acts requiring registration (*a*); and a deed which is for the benefit of specified creditors only (and not for the creditors generally) is not, strictly speaking, a "Deed of Arrangement" at all,—and so requires no registration as such (*b*), —save, possibly, as regards lands in England.

Trust deeds for creditors,—registration of.

(*s*) *Lomas* v. *Graves & Co.*, 1904. 2 K. B. 557.
(*t*) *Tomkins* v. *Saffery*, 3 App. Ca. 213.
(*u*) *In re Brindley*, 1906, 1 K. B. 377.
(*x*) *Davis* v. *Petrie*, 1906, 2 K. B. 786; *Ponsford* v. *Union Bank*, 1906, 2 Ch. 444.
(*y*) 50 & 51 Vict. c. 57.
(*z*) 51 & 52 Vict. c. 51.
(*a*) *Dulaney* v. *Merry*, 1901, 1 K. B. 536.
(*b*) *In re Saumarez*, 1907, 2 K. B. 170.

(*E*) *Equitable Assignments.*

(*E*) *Equitable assignments.* General rule of the old common law.

By the old common law, no chose in action could be granted or assigned; but in equity,—where the assignment was *for value*,—all choses in action were assignable, expectancies also being assignable where the assignment was for value (*c*), as, for example, the mere expectancy of an heir-at-law of succeeding to the estate of his ancestor (*d*); or the interest which a person might take under the will of another who was living (*e*): or the future cargo of a ship in mortgage (*f*), or the future stock-in-trade to be brought on mortgaged premises (*g*), or the future book-debts of a business (*h*),—all of which were mere "*naked possibilities*": And, after such an assignment for value, —but not where the assignment is purely voluntary (*i*), —when the expectancy falls into possession or otherwise matures, the assignment will be enforced (*k*). And even a misfeasance claim against directors is assignable in equity; and a chose in action, which (on the face of it) is expressed "*not to be assignable in any case whatever*," is (notwithstanding) assignable in equity,—as is also a policy of life assurance (*l*),—even a Friendly Society's policy (*m*): Also, a contract which is in its own nature assignable is not the less so, merely because the word "*assigns*" is not mentioned in the writing whereby the contract is evidenced (*n*): And, on the other hand, a contract is not assignable, which is merely *personal* to the purporting assignor (*o*).

Respects in which equity infringed upon the rule of the old common law.

Trustee in bankruptcy,— his title as assignee,—

The trustee in bankruptcy, being the *general* assignee of all the property of the bankrupt, takes whatever a

(*c*) *Coombe* v. *Carter*, 38 Ch. D. 348.
(*d*) *Hobson* v. *Trevor*, 2 P. W. 191.
(*e*) *Bennett* v. *Cooper*, 9 Beav. 252.
(*f*) *Lindsay* v. *Gibbs*, 22 Beav. 522.
(*g*) *Hallas* v. *Robinson*, 15 Q. B. D. 288.
(*h*) *Official Receiver* v. *Tailby*, 13 App. Ca. 523.
(*i*) *Towry-Law* v. *Burne*, 1903, 1 Ch. 697.
(*k*) *Holroud* v. *Marshall*, 10 H. L. Ca. 191.
(*l*) *In re Turcan*, 40 Ch. Div. 5.
(*m*) *Griffin* v. *Griffin*, 1902, 1 Ch. 135.
(*n*) *Tolhurst's case*, 1903, A. C. 414.
(*o*) *Kemp's case*, 1906, 2 K. B. 604.

particular assignee would take,—So that (*e.g.*) the contingent interests of the bankrupt vest in the bankruptcy trustee, equally as they would (but for the bankruptcy) have vested in the bankrupt himself; and where a legacy was given to an undischarged bankrupt conditionally on his obtaining his discharge, and afterwards the bankrupt was discharged, the legacy (which had meanwhile vested contingently in the bankruptcy trustee) was held to have vested absolutely in that trustee on the discharge in bankruptcy being obtained (*p*).

(1) Vested rights.

(2) Conditional (or contingent) rights.

And where A. is carrying on a business,—in respect of which he becomes from time to time entitled to periodically accruing fees or other profits as the "*fruits*" of the business; and he assigns these future fees and profits (or "*fruits*") to X. by way of mortgage; and then A. goes bankrupt, and Z. is appointed the trustee in his bankruptcy; and Z. elects to carry on the business,—All the fees and profits accruing from the business *thereafter, and as from the date of the trustee's intervention*, are the trustee's property,—That is to say, they never were or became the bankrupt's property at all,—and therefore they remain in Z., and do not vest in or pass to X., as mortgagee (*q*).

The old common law rule against the assignment of choses in action, was successively relaxed,—That is to say, Firstly, negotiable instruments became, by the law merchant, assignable; and, Secondly, wherever the debtor assented to the transfer of the debt, the assignee (suing in the name of his assignor) was permitted (on the *implied* promise which resulted from such assent) to sue the debtor direct (*r*): And other future interests were afterwards made assignable by statute,—That is to say, by the 8 & 9 Vict. c. 106, s. 6, contingent and future interests (and "*possibilities coupled with an interest*") in *real* estate; by the 30 & 31 Vict. c. 144, policies of life assurance; by

Respects in which the common law even has infringed upon its own rule.

(*p*) *Davidson* v. *Chalmers*, 33 Beav. 653.
(*q*) *Wilmot* v. *Alton*, 1897, 1 Q. B. 17.
(*r*) *De Pothonier* v. *De Mattos*, Ell. Bl. & Ell. 467.

the 31 & 32 Vict. c. 86 (now repealed and its provisions in this respect re-enacted by the 6 Edw. VII. c. 41), policies of marine assurance,—and (eventually) by the 36 & 37 Vict. c. 66, s. 25, sub-sect. 6, debts and other *legal* choses in action generally (*s*),—*Scil.*, "*where the assignment was absolute, and not by way of charge only*" (*t*),—a provision which is wide enough to extend also to accident assurance policies (*u*), and even to the compensation made payable by statute, for the tortious damage which is thereby legalised (*x*): and consols themselves even are only choses in action within the meaning of all these rules (*y*). But, as regards assignments which depend upon the 36 & 37 Vict. c. 66, for their efficacy, the assignment is required to be itself in writing, and to be completed by a written notice of it to the debtor; and such notice must be given by the assignee before he may commence his action for the recovery of the debt (*z*); and only the *whole* debt (and not a *part* of it) may be assigned under the Act (*a*),—*Scil.*, legally and effectively:

Order given by debtor to his creditor upon a third person a good equitable assignment, *i.e.*, appropriation.

There may also, in equity, be other valid assignments, not complying with these provisions of the last-mentioned Act; and (for example) an order given by a debtor to his creditor on a third person who holds any funds of the debtor, to pay the creditor out of such funds, has always been considered as a binding equitable assignment,—or (speaking more accurately) as a binding equitable *appropriation*,—of so much money to or in favour of the creditor (*b*). And the title arising under such an equitable appropriation or assignment (which, where the assignment is by letter, is complete as from the date of posting the letter) (*c*), holds good, as against the title of the trustee under the subsequently accruing bankruptcy of the

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(*s*) *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511.
(*t*) *Pump House Hotel case*, 1902, 2 K. B. 190.
(*u*) *Stokell* v. *Heywood*, 1897, 1 Ch. 459.
(*x*) *Dawson* v. *City Rail. Co.*, 1905, 1 K. B. 260.
(*y*) *Wildman* v. *Wildman*, 9 Ves. 174.
(*z*) *Bateman* v. *Hunt*, 1904, 2 K. B. 530.
(*a*) *Forster* v. *Baker*, 1910, 2 K. B. 636.
(*b*) *Diplock* v. *Hammond*, 5 De G. M. & G. 320.
(*c*) *Alexander's case*, 1903, 2 K. B. 208.

assignor (*d*); and also against the title of the executor or administrator of the assignor upon his death,—And in the latter case (*e*), and also in the former case (*f*), although the notice required to perfect the assignment (*as against third parties*) may not have been given till after the death or (as the case may be) the bankruptcy. And the title under such an appropriation or assignment, is good also against any execution (by garnishee order or otherwise) levied by a judgment creditor of the assignor (*g*).

Mandate from principal to agent,—confers no right on the creditor.

But a mere revocable mandate is not an equitable assignment or appropriation (*h*),—because it is a mere agency; and giving a man your cheque in payment, is not an appropriation (either legal or equitable (*i*)),—as neither, *semble*, is the right which arises by subrogation (*k*). Also, there can be no effective appropriation, if no specific fund is specified out of which the payment is to be made (*l*). And, *nota bene*, any purported appropriation, which amounts only to a mandate, will be revoked by the bankruptcy of the debtor (*m*),—which a true equitable assignment or appropriation would not be (*n*). But a mandate (or power of attorney), which is incident to a security, is irrevocable *while and so long as the security continues* (*o*).

Other cases in which appropriation is incomplete.

Notice to legal holder, by assignee of chose in action, necessary to perfect title as against third person.

In order that third parties may be bound by the equitable assignment or appropriation, it is necessary, according to the rule in *Dearle* v. *Hall* (*p*), for the assignee or appropriatee to do everything towards having possession which the subject admits of; and for this purpose he must

(*d*) *Burn* v. *Carvalho*, 4 My. & Cr. 690.
(*e*) *Bateman* v. *Hunt*, *supra*.
(*f*) *In re Wallis*, 1902, 1 K. B. 719.
(*g*) *Yates* v. *Terry*, 1902, 1 K. B. 527.
(*h*) *Rodick* v. *Gandell*, 1 De G. M. & G. 763.
(*i*) *Hopkinson* v. *Forster*, L. R. 19 Eq. 74.
(*k*) *Nelson & Sons* v. *Nelson Line*, 1906, 2 K. B. 217.
(*l*) *Percival* v. *Dunn*, 29 Ch. Div. 128.
(*m*) *Ex parte Hall, In re Whitting*, 10 Ch. Div. 615.
(*n*) *Dunlop Rubber case*, 1905, A. C. 454.
(*o*) *Frith* v. *Frith*, 1906, A. C. 254.
(*p*) 3 Russ. 1.

give notice to the legal holder of the fund,—that is, to the debtor himself or (as the case may be) to his legal personal representative (such representative being first duly constituted such (*q*)),—or, generally, to the person who (and who alone) can lawfully receive (and also give the due legal receipt for) the debt (*r*); and that notice is parcel of the right of action itself (*s*).

Notice,—effect of giving;

The notice is (for many purposes) tantamount to possession,—perfecting the title and giving (so to speak) a complete right *in rem*,—So that, if the debtor or (as the case may be) his legal personal representative or other the legal hand aforesaid, should (*after receiving notice of the assignment*) pay the original creditor the debt or any part thereof,—or should even settle with him regarding the debt or any part thereof (*t*),—he will be liable to pay the amount over again to the assignee,—Excepting that, if the debt is secured by a negotiable instrument, and the payment is made to the holder of such instrument, the party paying is thereby fully discharged (*u*).

and effect of not giving it.

If the assignee is satisfied that the assignor will make no improper use of the possession in which he is allowed to remain, notice of the assignment is not necessary,—*Scil.*, because (*as against the assignor*) the title is perfect without the notice; but if the assignor, taking fraudulent advantage of the notice not having been given, should subsequently assign to a second assignee, the first assignee will be postponed to the second assignee,—excepting, possibly, where the trustee in the bankruptcy of the assignor is the second assignee (*x*); and that will be so, notwithstanding the first assignee may have taken proceedings in Court to realise his assignment (and may also have registered his action as a *lis pendens* (*y*)), and may even have obtained the appointment of a receiver in the action (*z*),—*Scil.*, Because all these proceedings are an

(*q*) *In re Dallas*, 1904, 2 Ch. 385.
(*r*) *Stephens* v. *Green*, 1895, 2 Ch. 148.
(*s*) *Kelly* v. *Selwyn*, 1905, 2 Ch. 117.
(*t*) *Stocks* v. *Dobson*, 4 De G. M. & G. 11.
(*u*) *Bence* v. *Shearman*, 1898, 2 Ch. 582.
(*x*) *In re Wallis*, 1902, 1 K. B. 719; *In re Anderson*, 1911, 1 K. B. 896.
(*y*) *Wigram* v. *Buckley*, 1894, 3 Ch. 483.
(*z*) *Rutter* v. *Everett*, 1895, 2 Ch. 872.

ineffectual substitute for "*the notice*" which the law requires to be given (*a*); and the question always is, simply,—Has "*the notice*" been given; and it is not a question of laches at all (*b*).

Notice,—what sufficient, in cases of difficulty.

Where the assignee is unable to give the notice, if he has otherwise done all in his power towards taking possession, he will not lose his priority (*c*); and when (through infancy or otherwise) he is unable to give the necessary notice, his priority will, *semble*, remain,—at least as against the trustee in bankruptcy of the assignor (*d*). But the notice, if given to the solicitor of the debtor, is only sufficient, if it be communicated to his client (*e*).

Notice to old trustees, where they all subsequently die or retire.

If the notice is duly given to *all* the trustees who are such at the date of the assignment (*f*), that is sufficient,—as against any subsequent assignee,—notwithstanding that (at the date of the subsequent assignment) the trustees who received the notice are all dead, and the new trustees who have been appointed in their places are wholly ignorant of the notice (*g*),—Wherefore the first assignee will (in such a case) retain his priority (*h*); nor will the new trustees be deemed to have had constructive notice of the notice given to the old trustees (*i*),—nor will they become personally liable on that account to anyone (*k*); but where the assignor himself is one of the old trustees, the notice to him alone will not suffice for the protection of the first assignee as against the second assignee (*l*).

Notice,—form of.

The notice required to be given need not be (*e.g.*) the formal notice prescribed (by the 30 & 31 Vict. c. 144) for assignments of policies of life assurance,—except as against the assurance office itself,—but may be any in-

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(*a*) *In re Freshfield's Trust*, 11 Ch. Div. 198.
(*b*) *In re Lake, Ex parte Cavendish*, 1903, 1 K. B. 151.
(*c*) *Johnstone* v. *Cox*, 19 Ch. Div. 17.
(*d*) *In re Mills*, 1895, 2 Ch. 564; *In re Wallis*, *supra*.
(*e*) *Saffron Walden* v. *Rayner*, 10 Ch. Div. 696.
(*f*) *In re Phillip's Trusts*, 1903, 1 Ch. 183.
(*g*) *Brittin* v. *Partridge*, 1899, 1 Ch. 163.
(*h*) *Ward* v. *Duncombe*, 1893, A. C. 368.
(*i*) *Hallows* v. *Lloyd*, 39 Ch. Div. 686.
(*k*) *Phipps* v. *Lovegrove*, L. R. 16 Eq. 80.
(*l*) *Browne* v. *Savage*, 4 Drew. 635.

formal (but otherwise sufficient) notice as between the successive assignees (*m*); and even where the assignment operates only under the 36 & 37 Vict. c. 66, s. 25, sub-s. 6, the notice, although it must be *in writing*, is not otherwise formal (*n*).

When notice is not requisite;

This doctrine of notice is not applicable to shares in companies registered under the Companies Act, 1908 (or the prior Companies Acts (*o*)); nor to equitable interests in land (*p*); nor to equitable leaseholds (or other chattel interests) in real estate (*q*); but it is applicable to the proceeds of the sale of real estate (*r*), and to leaseholds which are subject to a trust for conversion (*s*), and to moneys secured by debentures containing a charge on real estate (*t*); and as regards rents, the doctrine is applicable to rents which have actually accrued due (*u*), but not, *semble*, to accruing rents (*x*).

or not available.

When the chose in action is in Court, then (in lieu of giving notice of the assignment to the officer of the Court) a stop order on the fund must be obtained, by or on behalf of the assignee; and such stop order will have all the effect of notice (*y*),—provided it be obtained in the proper suit, but not otherwise (*z*); and the stop order appears still to be necessary, in the case of all assignments by deed (or other act of the party), notwithstanding that it is not now necessary in the case of a charging order (*a*).

Assignee of a chose in action takes subject to the *existing* equities.

The assignee (or equitable appropriatee) of a chose in action takes, in general, subject to all the equities which subsist against the assignor,—*Scil.*, being equities affecting or attaching to the subject-matter, "*and existing* (*or*

(*m*) *Newman* v. *Newman*, 28 Ch. Div. 674.
(*n*) *Western Waggon Co.* v. *West*, 1892, 1 Ch. 271.
(*o*) *Société Générale* v. *Tramways Union*, 11 App. Ca. 20.
(*p*) *Hopkins* v. *Hemsworth*, 1898, 2 Ch. 347.
(*q*) *Wiltshire* v. *Rabbits*, 14 Sim. 76.
(*r*) *Lloyds Bank* v. *Pearson*, 1901, 1 Ch. 865.
(*s*) *White* v. *Ellis*, 1892, 1 Ch. 188.
(*t*) *Christie* v. *Taunton, &c. Co.*, 1893, 2 Ch. 175.
(*u*) *Brook* v. *Badley*, L. R. 4 Eq. 106, on p. 111.
(*x*) *De Nicholls* v. *Saunders*, L. R. 5 C. P. 589.
(*y*) *Montefiore* v. *Guedalla*, 1903, 2 Ch. 26.
(*z*) *Stephens* v. *Green*, 1895, 2 Ch. 148.
(*a*) *Brereton* v. *Edwards*, 21 Q. B. D. 488.

arising out of circumstances existing) before the notice given of the assignment" (*b*). For example, in *Turton* v. *Benson* (*c*), where a son on his marriage was to have from his mother (as a portion with his wife) exactly as much as the intending father-in-law should allow to his daughter; and privately and without notice to and in fraud of his mother (who treated for the marriage), the son gave a bond to the intended wife's father, to pay back £1,000 of the wife's portion seven years after, in consideration that the father-in-law should make the wife's portion £3,000, instead of (as he had intended) £2,000 only; and the father-in-law afterwards went bankrupt, and the bond vested in the trustee in the bankruptcy for the benefit of the creditors of the bankrupt,—It was held, that the bond, being void in equity in the hands of the father-in-law (on account of the *fraud*), could not be made better by the assignment to the bankruptcy trustee. And in *Knapman* v. *Wreford* (*d*), where certain legatees (who were also the testator's next of kin) commenced an action in the Probate Division against the executor of the will, claiming a revocation of the probate; and pending that action, they assigned (some of them by way of sale outright, and the others of them by way of mortgage) all their shares, whether as legatees or as next of kin; and subsequently their action was dismissed with costs to be paid to the executor-defendant,—The Court held, that these costs were proper to be set off against the amount of the legacies, *and that the* ASSIGNEES *also of the legatees took their assignments subject to such set-off*. And the like decision was given in *Christmas* v. *Jones* (*e*).

And here it is to be noted generally, that the assignee (whether by way of purchase or of mortgage) of the *residue* (or of any share of the residue) of a testator's personal estate, takes subject to the payment thereout of the legacies and of the general costs of an action for the administration of the estate,—and subject also, of course, to the payment of all the "testamentary expenses," and

(*b*) *Doering* v. *Doering*, 42 Ch. Div. 203.
(*c*) 1 P. Wms. 496.
(*d*) 18 Ch. Div. 310.
(*e*) 1897, 2 Ch. 190.

of the "debts,"—even of debts emerging late in the administration of the assets (*f*),—Excepting that, if the share has been carried over to a separate account,—or so far as it has been so carried over,—the assignee will be (in effect) relieved of these general costs (*g*).

Exceptions to the general rule: (a) Bills and notes.

Length of time will, however, discharge these equities,—at least occasionally,—and so take the case of the assignee out of the general rule (*h*); and the rule never did (nor does) apply to negotiable instruments (*i*). But if a bill or note (*k*), as distinguished from a mere cheque (*l*), is overdue, the rule applies; also, if a bill is bad in the first instance for fraud or illegality (*m*), or on the ground of infancy (*n*), the indorsee or transferee thereof, who takes from the payee *with notice of the fraud or illegality, or of the infancy,* is in no better position than the payee himself,—*Secus*, where he takes without notice (*o*), or sues on the consideration (as distinguished from the bill or note itself (*p*)), or sues on some new consideration (*q*).

(b) Debentures payable to bearer.

Also, the rule will not apply to instruments, which (as between the original contracting parties) are to be deemed to be *negotiable:* For example, debentures which (upon the face of them) are payable to *bearer*, will bind the company issuing them in the hands of the transferees thereof for value, irrespectively of any equities between the company and the original holders (*r*); and documents, which of themselves are not negotiable in the strict sense of that phrase (*s*), may (for this purpose) become negotiable by estoppel (*t*),—provided the estoppel be consistent

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(*f*) *Hooper* v. *Smart*, 1 Ch. D. 90.
(*g*) *Bartlett* v. *Charles*, 45 Ch. D. 458.
(*h*) *Ex parte Chorley*, L. R. 11 Eq. 157.
(*i*) *London and County Bank* v. *River Plate Bank*, 21 Q. B. D. 535.
(*k*) *Brown* v. *Davies*, 3 T. R. 80.
(*l*) *London and County Bank* v. *Groome*, 8 Q. B. D. 288.
(*m*) *Woolf* v. *Hamilton*, 1898, 2 Q. B. 337.
(*n*) *Smith* v. *King*, 1892, 2 Q. B. 543.
(*o*) *May* v. *Chapman*, 16 Mee. & W. 355.
(*p*) *Moulis* v. *Owen*, 1907, 1 K. B. 746.
(*q*) *Hyams* v. *Stuart-King*, 1908, 2 K. B. 696.
(*r*) *Crouch* v. *Crédit Foncier*, L. R. 8 Q. B. 374.
(*s*) *London and County Bank* v. *River Plate Bank*, 20 Q. B. D. 232.
(*t*) *Goodwin* v. *Robarts*, 1 App. Ca. 476.

with the terms of the document (*u*). Also, any equities (in the nature of set-off) which arise in favour of the debtor,—or against him,—*subsequently* to the notice given of the assignment, are not, in general, available as against the assignee (*x*).

Subsequent equities,—do not affect the assignee.

As regards assignments, generally, which are void for illegality, there are the three following groups of such assignments, viz.,—Firstly, a Court of Equity will, upon the ground of public policy, refuse to give effect to the assignment of the pay or pension of an officer in the army (*y*), or in the navy (*z*),—*Scil.*, where the assignment is by deed (or is otherwise by the act of the assignor). But where the office is a sinecure or the duties of it have ceased, it might be different (*a*),—Unless where (by the express terms of the grant) the pay or pension is rendered inalienable (*b*). And, *nota bene*, an old age pension (under the 8 Edw. VII. c. 40) is expressly declared inalienable.

Assignments void for illegality: (1) Assignments contrary to public policy.

On the other hand, the salary of a workhouse chaplain is assignable (*c*). Also, under the Bankruptcy Act, 1883, s. 53, the pay or pension or salary of a naval or military man (and of a judge even) may, to a limited extent, be got at (*d*).

Lastly, as regards alimony (*e*),—or any allowance in the nature of alimony (*f*) (including a police-court allowance to the wife (*g*)),—that is not assignable,—*Scil.*, Because it rests in (and continues to rest in) the judge, to modify it at any time, either by increasing it or by diminishing it (*h*). Nor is alimony "capable of valua-

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(*u*) *Bentinck* v. *London Joint Stock Bank*, 1893, 2 Ch. 120.
(*x*) *Roxburghe* v. *Cox*, 17 Ch. D. 520.
(*y*) *Birch* v. *Birch*, 8 P. D. 163; *Crowe* v. *Price*, 22 Q. B. D. 429.
(*z*) *Apthorpe* v. *Apthorpe*, 12 P. D. 192.
(*a*) *In re Ward*, 1897, 1 Q. B. 266.
(*b*) *Lucas* v. *Harris*, 18 Q. B. D. 127.
(*c*) *In re Mirams*, 1891, 1 Q. B. 594.
(*d*) *In re Saunders, Ex parte Saunders*, 1895, 2 Q. B. 424.
(*e*) *In re Robinson*, 27 Ch. Div. 160.
(*f*) *Watkins* v. *Watkins*, 1896, P. 222.
(*g*) *Paquin* v. *Snary*, 1909, 1 K. B. 688.
(*h*) *Dunbar* v. *Dunbar*, 1909, P. 90; and 7 Edw. VII. c. 12, s. 1.

tion" in bankruptcy (*i*); and the arrears of alimony (*k*), —even arrears accrued due *before* the date of the receiving order (*l*), are not provable in bankruptcy.

(2) Assignments affected by champerty and maintenance; and of mere *lites pendentes*.

Secondly, Equity refuses to give effect to assignments which involve champerty and maintenance,—or champerty alone or maintenance alone,—champerty being aggravated maintenance, that is to say, maintenance *coupled with an agreement to divide the spoil* (*m*): Equity refuses also to enforce the buying of "pretenced" titles (*n*); and the buying of a "pretenced title" to lands was not only not enforceable in a civil action, but (under the 32 Hen. VIII. c. 9, s. 2) subjected the parties thereto to penalties and forfeitures (*o*),—which latter provision has now been repealed (*p*).

However, the purchase of an interest *pendente lite* (*q*), or a mortgage *pendente lite* (*r*), or even the advance of money for carrying on a suit, may be good,—*Scil.*, *if the parties have a common interest* (*s*), or if there exists between them the relation of father and son (*t*), or of master and servant (*u*). And to an action for maintenance,—*Scil.*, simple maintenance,—"charity" (*x*),—or, indeed, any reasonable motive for the purchase which displaces the inference of maintenance (*y*),—will be a good defence. Also a purchase from the defendant is always good, he having the possession, and therefore something more than a *mere* naked right to litigate; and, under the Bankruptcy Act, 1883, the trustee in the bank-

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(*i*) *Linton* v. *Linton*, 15 Q. B. D. 239.
(*k*) *In re Hawkins*, 1894, 1 Q. B. 25.
(*l*) *Kerr* v. *Kerr*, 1897, 2 Q. B. 439.
(*m*) *Huttley* v. *Huttley*, L. R. 8 Q. B. 112.
(*n*) *Rees* v. *De Bernardy*, 1896, 2 Ch. 437.
(*o*) *Kennedy* v. *Lyell*, 15 Q. B. D. 491.
(*p*) 60 & 61 Vict. c. 65, s. 11.
(*q*) *Knight* v. *Bowyer*, 2 De G. & J. 421, 455.
(*r*) *Cockell* v. *Taylor*, 15 Beav. 103, 117.
(*s*) *Hunter* v. *Daniel*, 4 Hare, 420.
(*t*) *Burke* v. *Green*, 2 Ball & B. 521.
(*u*) *Wallis* v. *Duke of Portland*, 3 Ves. 503.
(*x*) *Harris* v. *Briscoe*, 17 Q. B. D. 504.
(*y*) *Fitzroy* v. *Cave*, 1905, 2 K. B. 364.

ruptcy (*z*),—and under the Companies Act, 1908, the liquidator in the winding up (*a*),—can assign a *lis pendens* of the bankrupt or company.

(3) Assignments by incapacitated persons.

And, Thirdly, the purchase by a solicitor *pendente lite* of the subject-matter of the suit is invalid (*b*),—*Scil.*, if (and only if) he is the vendor's solicitor at the time of the purchase (*c*). Also, an assignment by a husband of his right to administer to the wife's estate, is invalid (*d*); and, generally, whenever the assignee is incapacitated by the law regulating the assignment, the assignment is, of course, invalid, although it should be of an English policy of assurance (*e*). Also, the right of a petitioning creditor to proceed with his winding-up petition cannot be assigned (*f*); and an undischarged bankrupt's expectation of a surplus cannot be assigned,—*so as to give his assignee any right to interfere in the bankruptcy administration* (*g*); and a partner may not execute an assignment of his share in the partnership,—*so as to entitle the assignee to interfere in the management of the partnership business* (*h*). And it may be conveniently mentioned here, that if a chose in action (*e.g.*, a loan) is illegal in its first creation,—and *void* for the illegality,—say, on the grounds of public policy on which the Money Lenders Act, 1900 (*i*), is supposed to be based,—the assignment of the chose in action to a purchaser thereof for value, *bonâ fide and without notice*, will not purge the illegality,—but the debt will continue to be a *void* debt (*k*).

(*z*) *Sesar* v. *Lawson*, 15 Ch. Div. 426.
(*a*) *In re Park Gate Waggon Works Co.*, 17 Ch. Div. 234.
(*b*) *Simpson* v. *Lamb*, 7 Ell. & Bl. 84.
(*c*) *Davis* v. *Freethy*, 24 Q. B. D. 519.
(*d*) *Re Jane Turner*, 12 P. D. 18.
(*e*) *Lee* v. *Abdy*, 17 Q. B. D. 309.
(*f*) *In re Paris Skating Rink Co.*, 5 Ch. Div. 959.
(*g*) *Ex parte Sheffield, In re Austin*, 10 Ch. Div. 434.
(*h*) *Garwood* v. *Paynter*, 1903, 1 Ch. 236.
(*i*) 63 & 64 Vict. c. 51.
(*k*) *In re Robinson, Clarkson* v. *Robinson*, 1911, 1 Ch. 230.

(*F*) *Trust, Creation of.*

(*F*) *Trusts,—how created.*

"The three certainties" required for the creation of a trust.

No particular form of words is necessary to the creation of a "*trust*;" but these three things are necessary, viz.:—(1) words which are certain; (2) a subject-matter which is certain; and (3) an object which is certain,—these being "THE THREE CERTAINTIES" for the creation of a "*trust*."

(1) Recommendation must be imperative, *i.e.*, certain.

And, firstly, the words must have a meaning which is imperative and certain; but such words as "willing or desiring," "having the fullest confidence," "heartily beseeching," and the like, are certain enough,—*Scil.*, *in the absence of other words depriving them of that effect* (*l*). But where a testator gives (*e.g.*) all his real and personal estate to his wife in fee simple for her "*absolute*" use, adding the words, "*in full confidence*" that she will do what is right with it among the children, no trust will be created (*m*),—*Scil.*, unless where the added words can properly be construed as a "*gift over*" to the children (*n*). Also, the mere use of the word "*trust*" will not create one, if a trust was not intended (*o*); and, of course, a mere condition is not a trust; nor, in general, is an agency, or a debt (even a mortgage debt), a trust.

(2) Subject-matter must be certain.

Secondly, The subject-matter of the recommendation must be certain,—because otherwise the whole thing would be void for the uncertainty. Therefore, where a testator gave his wife all his property, "trusting that she would (in fear of God and in love to the children) make such use of it as should be for her own and their spiritual and temporal good, remembering always (according to circumstances) the Church of God and the Poor,"—The Court held, that the wife was absolutely entitled to the property,—*Scil.*, Because you could not say, how much was to be for God, and how much for the Church, and how much for herself, &c., &c. (*p*). Also, generally, where

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(*l*) *Oldfield* v. *Oldfield*, 1904, 1 Ch. 549.
(*m*) *Williams* v. *Williams*, 1897, 2 Ch. 12 (citing *Wright* v. *Atkins*, T. & R. 143).
(*n*) *Hanbury* v. *Fisher*, 1905, A. C. 84.
(*o*) *The Maori case*, 1902, A. C. 56.
(*p*) *Buggins* v. *Yates*, 9 Mad. 122.

there is an *absolute* gift of property to one person, coupled with a recommendation that the donee shall give to some other person "*what shall be left*" at his death, the subject will be considered uncertain,—Unless, of course, where the will can be properly construed as giving only a *life-estate* to the first taker, *with* a right of enjoyment *in specie,* or the like, and with a gift over (or remainder over) upon the death of the donee (*q*).

(3) The object must be certain.

Thirdly, The object of the recommendation must be certain; and in one case where a testator bequeathed the residue of his property to his wife, not doubting that she (the widow) would consider "*his near relations,*" the objects were deemed wholly uncertain,—it not being clear, whether relations at the testator's own death, or at the widow's death, were intended (*r*). Also, the modern decisions are against construing precatory words as trusts (*s*), and rather look upon the precatory words as expressing merely the *motive* of the gift,—the motive, being, of course, immaterial to the gift (*t*).

If trust be intended, but not validly created, it enures for the benefit not of the trustee, but of the heir-at-law or next of kin.

If, however, a trust was intended, in fact, and it fails as a trust, the legatee or devisee does not (as a rule) take for his own benefit,—but is, in general, excluded from the beneficial interest, in favour either of the heir or of the next of kin of the testator, according as the property is real estate or is personal estate; and, in order to exclude such legatee or devisee, it is only necessary to show from the will that a trust was intended (*u*).

(*G*) *Secret Trusts.*

(*G*) *Secret Trusts,*—creation and enforcement of.

Where the legal estate in property given by will is in the executor, but the beneficial interest in the property is undisposed of by the will, a further writing (to be executed as a will) is necessary to dispose of the beneficial interest: Therefore, no trust declared by word of mouth

(*q*) *Game* v. *Young,* 1897, 1 Ch. 881.
(*r*) *Sale* v. *Moore,* 1 Sim. 534.
(*s*) *In re Conolly, Conolly* v. *Conolly,* 1910, 1 Ch. 219.
(*t*) *In re Sanderson's Trust,* 3 K. & J. 497.
(*u*) *Briggs* v. *Penny,* 3 Mac. & G. 546.

Evidence, in proof of,—(1) In the general case;

only,—or even declared by a further writing, unless such further writing is duly executed and attested as a will (*x*), or (being in existence at the date of the will (*y*)) is duly incorporated in the will,—is (in such a case) valid. On the other hand, if it appear by the will itself, that the executor (or legal devisee) is intended to take the beneficial interest also,—No parol evidence is admissible either to contradict or to vary the plain effect of the will,—So that the legal devisee or executor will, in that case, keep the beneficial interest.

(2) In the case of fraud.

Nevertheless,—according to the universally accepted rule,—*parol evidence may*, in the case of fraud, *be admitted to prove*, that *the legal devisee or executor procured the gift to be made to himself by the will* by a fraud on his part,—*Scil.*, on the strength of his having undertaken the execution of a certain SECRET TRUST,—In which latter case, the Court will, if it finds that the secret trust is lawful, decree the execution thereof (*z*),—and otherwise will give the property (if real) to the heir-at-law, and (if personal) to the next of kin of the testator.

Secret trust,—creation of, *subsequently* to the execution of the will.

But the Court requires the due and strict proof of the secret trust (*a*); and where there was, in fact, no secret trust originally, but the testator *afterwards* (and without making a fresh will or a codicil) imposes the secret trust (*b*), and the legal beneficial devisees are two or more (whether entitled jointly or in common), the testator must communicate his desire to both (or all) of them (*c*).

(*H*) *Powers in the nature of Trusts.*

(*H*) *Powers in the nature of trusts.*

As regards *Powers in the Nature of Trusts*,—and which may otherwise be called *Trusts in the Disguise of Powers*,—The general rule is, that (in the case of such so-called powers) the failure of the donee of the power to exercise the power, will not prejudice the intended objects. It

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(*x*) *Boyes* v. *Carritt*, 26 Ch. D. 531.
(*y*) *Singleton* v. *Tomlinson*, 3 App. Ca. 404.
(*z*) *Russell* v. *Jackson*, 10 Ha. 214; *Norris* v. *Frazer*, L. R. 15 Eq. 318.
(*a*) *Rowbotham* v. *Dunnett*, 8 Ch. Div. 430.
(*b*) *Irvine* v. *Sullivan*, L. R. 8 Eq. 673.
(*c*) *Witham* v. *Andrew*, 1900, 1 Ch. 237; *Tee* v. *Ferris*, 2 K. & J. 357.

is perfectly clear, of course, that (in the case of a *mere* power left unexecuted) the Court will not execute it; and that (in the case of a *trust*) the Court will execute the trust (*d*),—So that the only doubt was, whether the Court would exercise the power-trust or trust-power (the duty to execute which had been neglected by the donee): And the answer was,—the Court would execute it.

And accordingly, in *Burrough* v. *Philcox* (*e*), where the testator (after giving life-interests in certain property to his two children, with remainder to their issue) declared, that, in case his two children should both die without leaving lawful issue (which event happened), the survivor of his two children should have power to dispose of the property by will "amongst my nephews and nieces or their children, either all to one of them, or to as many of them as my surviving child shall think proper,"—A trust was held to have been well created, in favour of the testator's nephews and nieces and their children, subject to a power of *selection* only in the surviving child of the testator.

And it is to be here mentioned, that when equity executes an unexecuted trust-power, she applies her own maxim, that equality is equity,—and divides the property equally,—although the donee of the power (if she had chosen) might have given unequal shares (*f*). But, of course, before the Court will interpose in that way, there must first be a true power-trust or trust-power, and not a mere power; and it is often difficult to say, whether the power is a mere power or is a trust-power; and the circumstance, that there is *no gift over* (in default of the power being exercised), will not of itself convert the power into a trust-power (*g*). And, on the other hand, a power which is, on the face of it, a general power may (on the true construction of the document creating it) be, in fact, a special power (*h*),—and may even be a trust-power.

(*d*) *Brown* v. *Higgs*, 8 Ves. 570.
(*e*) 5 My. & Cr. 72.
(*f*) *Willis* v. *Kymer*, 7 Ch. Div. 181.
(*g*) *Re Weekes' Settlement*, 1897, 1 Ch. 289.
(*h*) *Peover* v. *Hassell*, 1 J. & H. 341.

(*K*) *Liability of Purchasers for Purchase-Money.*

(*K*) *Liability of purchaser to see to the application of purchase-money*, where there are *cestuis que trustent*.

A *cestui que trust* has been diversely protected against the *mala fides* (and even against the carelessness) of his trustee; and it was anciently established in equity, that any one purchasing the trust estate was bound to see that the trustee duly paid over the purchase-money to the *cestuis que trustent*. But, Firstly, a purchaser of *personal* estate was never held liable in that respect,—unless where there was any fraud on his part (*i*); and, Secondly, a purchaser of *real* estate even was held to be exonerated, where the real estate was devised upon trust for the payment of the debts generally (with or without the legacies), or was *charged* with their payment (*k*); but, Thirdly, if the trust or charge was for the payment of *specified* debts,—or was for the payment of the *legacies* only,—the purchaser was (in that case) bound to see to the proper application of his purchase-money (*l*),—And accordingly,—and in relaxation of that old rule, it was successively enacted as follows:—

(1) Personalty—purchaser exonerated.

(2) Realty,—(a) Trust or charge for payment of debts and legacies generally,—purchaser exonerated. (b) Trust for payment of certain debts or legacies only, purchaser formerly not exonerated.

Lord St. Leonards' Act, 22 & 23 Vict. c. 35,—purchase or mortgage money only.

By Lord St. Leonards' Act (22 & 23 Vict. c. 35), s. 23, "the *bonâ fide* payment to (and the receipt of) any person to whom any *purchase* or *mortgage* money was payable upon any express or implied trust," effectually discharged the payer,—"*unless the contrary was expressed in the instrument creating the trust or security*,"—But the statute applied only to instruments executed on or after the 13th August, 1859: By Lord Cranworth's Act (23 & 24 Vict. c. 145), s. 29, "the receipt in writing of any trustees or trustee for *any* money payable to them or him by reason of any trust or power reposed or vested in them or him," sufficiently discharged the payer,—But the statute applied only to instruments coming into operation on or after the 28th August, 1860: And, eventually, by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 20, repeating the like provision contained in the Conveyancing Act, 1881, "the receipt in writing of any trustees or trustee [for ANY money or for any SECURITIES, or other

Lord Cranworth's Act,—any trust money whatsoever.

Conveyancing Act, 1881, and Trustee Act, 1893,—any trust moneys, securities, &c.

(*i*) *Collinson* v. *Lister*, 7 De G. M. & G. 634.
(*k*) *Dowling* v. *Hudson*, 17 Beav. 248.
(*l*) *Elliot* v. *Merryman*, Barn. Ch. Rep. 78.

personal property or effects, payable transferable or deliverable to them or him under ANY TRUST OR POWER], is a sufficient discharge for the same,—and effectually exonerates the person paying transferring or delivering the same from seeing to the application (or being answerable for any loss or misapplication) thereof,"—a provision which is retrospective. And, *nota bene*, the Settled Land Act, 1882, s. 40, contains a similar power as regards funds (being *capital moneys*) arising under that Act,—and that provision also is retrospective.

Settled Land Act, 1882,—capital moneys.

Since the changes effected by these successive enactments, a *bonâ fide* purchaser paying his purchase-money to the trustees, and obtaining their written receipt for same, *and not knowingly participating in any fraud*, is now in all cases exonerated from seeing to the application of his purchase-money,—So far as regards all trusts and charges, not only for *debts* but also for the *legacies* given by the will (*m*),—*Scil.*, where the trustee is lawfully selling the trust estate,—that is to say, is executing a trust for sale, or is exercising a power of sale (either express or implied) (*n*). But, of course, as regards mortgages and other charges which are paramount to the will,—the purchaser is not (by these statutes, or by any of them) exonerated,—but still requires to obtain the concurrence of such mortgagees or other incumbrancers in the conveyance to himself,—like as in the case of legacies charged on the land, where the beneficial devisee (and not the trustee or executor) is selling (*o*).

General conclusion on the Acts,—that the purchaser is now in all cases exonerate.

Paramount charges,—an exception.

Where it appears, that (in the case of *real* estate) *the beneficial devisee is in possession*, the presumption arises after twenty years from the death, that the DEBTS of the deceased have been paid,—In which latter case, the power in the trustees to sell is at an end (*p*),—equally as, where the real estate in fee simple has vested absolutely, and there is no continuing purpose for which the power is wanted (*q*). But there is no like presumption in the case

(*m*) *In re Dyson and Fowke*, 1896, 2 Ch. 720.
(*n*) *Corser* v. *Cartwright*, L. R. 7 H. L. 731.
(*o*) *In re Evans and Bethell*, 1910, 2 Ch. 438.
(*p*) *Re Tanqueray Willaume*, 20 Ch. Div. 465.
(*q*) *In re Cotton's Trustees and London School Board*, 19 Ch. D. 624.

of *leasehold* property (*r*),—So that an executor or administrator (where he has not assented to the bequest of the leasehold) may, at any time, lawfully sell it, without the concurrence of the beneficiaries (*s*),—Unless, *semble*, where the purchaser knows, that all the debts, &c., &c. have been paid (*t*).

Provided the purchase be from the true vendor.

Unless where the sale is by a tenant for life in possession under the Settled Land Act, 1882, or is by an absolute fee-simple owner,—the purchaser must also (in all cases) ascertain, that the person professing to sell the real estate is, in fact, the person authorised for that purpose: And by Lord St. Leonards' Act (22 & 23 Vict. c. 35), ss. 15, 16, in the case of a *charge* upon lands, the *trustee* is made the vendor, where the charged lands are devised to him in fee simple (or for other the testator's *whole* estate therein); and the *executor* is made the vendor in all other cases (*u*),—Unless, of course, where there is a properly qualified beneficiary, who, at the date of the death, was entitled and able to sell (*x*).

The *implied* power (to sell the charged real estate) comes to an end, however, when and so soon as any express power of sale contained in the will arises and becomes exerciseable (*y*).

Executor or administrator, —equal powers of.

The word "executor," in Lord St. Leonards' Act, did not include "administrator" (*z*); but in the Trustee Act, 1893, executors and administrators are now (for all the purposes of that Act) on a level (*a*). And by the Land Transfer Act, 1897 (*b*), as regards all testators and intestates who have died on or after the 1st January, 1898, the legal personal representative may now (for every purpose of administration) sell (and also convey) any real estate of the deceased,—even real estate which is not

(*r*) *Re Whistler*, 35 Ch. Div. 561.
(*s*) *In re Venn and Furze*, 1894, 2 Ch. 101.
(*t*) *In re Verrell's Contract*, 1903, 1 Ch. 65.
(*u*) *In re Adams and Perry*, 1899, 1 Ch. 554.
(*x*) *In re Barrow-in-Furness and Rawlinson*, 1903, 1 Ch. 339.
(*y*) *Hodkinson* v. *Quinn*, 1 J. & H. 309.
(*z*) *In re Clay and Tetley*, 16 Ch. Div. 3.
(*a*) 56 & 57 Vict. c. 53, s. 50.
(*b*) 60 & 61 Vict. c. 65, s. 2.

charged with the debts of the deceased or with any legacies.

Assignee of mortgage,—power of sale in.

Where the sale purports to be in exercise of the power of sale contained in a mortgage deed, and the sale purports to be made by the transferee of the mortgage, it must be seen, that the power is exerciseable (as it usually will be) by the *assign* of the mortgagee (*c*). Also, where it is a trustee who is selling, and he can only sell with the consent of the tenant for life,—If it should happen that the tenant for life has either mortgaged his life-estate (*d*), or gone bankrupt (*e*), the mortgagee, or (as the case may be) the bankruptcy trustee, must concur in the consent.

On a purchase from trustees,—sect. 56 Conveyancing Act, 1881, was not applicable;

By the Conveyancing Act, 1881, s. 55, the usual receipt clause in the body of the deed (or the usual indorsement of such receipt on the back of the deed) sufficiently evidences (in favour of subsequent *bonâ fide* purchasers) the payment of the money in such receipt expressed to have been received. Also, by the same Act, s. 56, such receipt (occurring either in the body or on the back of the deed) is a sufficient authority to the solicitor of the vendor (on his producing the purchase-deed) to receive (and to give a receipt for) the purchase-money (*f*); and although these provisions of s. 56 were not originally applicable to vendors who were trustees, but only to vendors who were themselves beneficially entitled to the purchase-money (*g*),—still, by the Trustee Act, 1893 (*h*), repeating the like provision contained in the Trustee Act, 1888 (*i*), trustee-vendors (including executors and administrators) are now entitled to the benefit of s. 56, equally with ordinary vendors (*k*). But, of course, an *attorney*, specifically appointed to sell the real estate of his principal and to receive the purchase-money therefor, is not (in the absence of an express clause to that effect

but is now applicable.

(*e*) *In re Rumney and Smith*, 1897, 2 Ch. 351.
(*d*) *Jones* v. *Winwood*, 10 Sim. 190.
(*e*) *In re Bedingfield and Herring*, 1893, 2 Ch. 332.
(*f*) *King* v. *Smith*, 1900, 2 Ch. 425.
(*g*) *In re Bellamy*, 24 Ch. Div. 387.
(*h*) 56 & 57 Vict. c. 53, s. 17.
(*i*) 51 & 52 Vict. c. 59, s. 2.
(*k*) *Lloyds Bank* v. *Bullock*, 1896, 2 Ch. 192.

contained in the power of attorney) authorised to sell any real estate of which his principal is only a mortgagee (*l*): nor may such an attorney appoint his solicitor to receive the purchase-money (*m*),—*Scil.*, because a deputy cannot (save under an express power in that behalf) make a deputy (*n*). Also, *semble*, a purchaser of real estate should not (always and as a matter of course) rest content with the usual receipt clause occurring in the body of the deed, but should (occasionally at least) insist also on the receipt being indorsed on the back of the deed,—a precaution which will materially hamper the vendor in afterwards pretending, that the deed (although executed by him) is *not his deed* (*o*),—*Scil.*, because the Court would hardly listen to him, if he were to say, that the indorsed receipt also was not his receipt (*p*). But a deed, although duly executed, may be (not yet) a deed,—but an "*escrow*" only, a thing which is (not infrequently) alleged by impecunious mortgagors (*q*).

Purchaser,—extra safeguards for, in special cases.

(*l*) *Re Dowson and Jenkins*, 1904, 2 Ch. 219.
(*m*) *Re Hetling and Merton*, 1893, 3 Ch. 269.
(*n*) *Perry* v. *Holt*, 2 De G. F. & J. 38.
(*o*) *Foster* v. *Mackinnon*, L. R. 4 C. P. 710.
(*p*) *Lloyds Bank* v. *Bullock*, 1896, 2 Ch. 192; *Bagot* v. *Chapman*, 1907, 2 Ch. 222.
(*q*) *London Freehold* v. *Suffield*, 1897, 2 Ch. 608.

CHAPTER III.

EXPRESS PUBLIC [OR CHARITABLE] TRUSTS.

TRUSTS in favour of Charities (sometimes called Express *Public* Trusts) are, in respect as well of their creation as also of their construction and execution, subject in general to the like rules as Express *Private* Trusts. Nevertheless, charitable gifts have sometimes received a more liberal construction than gifts to individuals,—and have sometimes, for reasons of state, been treated with a certain illiberality.

Charities,—definition of:

"Charitable Purposes" comprise the following objects or purposes (*a*), namely,—

(1) The objects specified in 43 Eliz. c. 4.

Firstly, The charitable uses specified in the statute 43 Eliz. c. 4,—Being the relief of aged impotent and poor people; the maintenance of the sick, and of maimed soldiers and mariners; the maintenance of schools of learning, and of free schools and scholars; the repair of bridges causeways sea-banks and highways, and of churches; the education and preferment of orphans, the marriage of poor maids, and the help of young tradesmen; and

And (2) Objects analogous thereto.

Secondly, certain uses which the Courts have at various times held to be charitable uses within the "spirit and intendment" (*b*) of the Act,—Being such uses as the repair of memorial windows (*c*), and of monuments (*d*) in churches; the repair of churchyards (*e*), and of the headstones to the graves therein (*f*); the repair

(*a*) *Income Tax Commissioners* v. *Pemsell*, 1891, App. Ca. 531.
(*b*) 51 & 52 Vict. c. 42, s. 14, sub-s. 2.
(*c*) *Att.-Gen.* v. *Ruper*, 2 P. Wms. 125.
(*d*) *Hoare* v. *Osborne*, L. R. 1 Eq. 585.
(*e*) *Att.-Gen.* v. *Lucas*, 1905, 1 Ch. 68.
(*f*) *MeLaughlin* v. *Att.-Gen.*, 1906, 2 Ch. 184.

of church organs, and the maintenance of church-chimes and of worship generally (*g*); the foundation of lectureships and professorships (*h*), but not of prizes for yacht-racing or the like (*i*); the supplying of towns with water, —or, generally, the sanitation or ornamentation of towns (*k*); the encouragement of good domestics (*l*), or of poor emigrants (*m*), and the pensioning off of "old and worn-out clerks" (*n*); the care and cure of useful quadrupeds (*o*); and the maintenance of village clubs and of reading-rooms (*p*),—or of other public institutes (*q*), —for the furtherance of religious knowledge (*r*), and the like:

Charities,—are objects of *a public* character.

But objects which (although charitable in a popular sense) are merely for the benefit of individuals (*s*),—for example, a bequest to ten poor clergymen of the Church of England, to be selected by J. S. (*t*),—are not charitable: Also, a bequest to a private institution (*e.g.*, an orphanage), maintained at the expense of an individual (*u*), is not a charitable gift,—although a gift to the vicar (or to the vicar and churchwardens) for the time being is (*ex necessitate rei*) a charity (*x*); and a bequest to "General William Booth" (of the Salvation Army), "for the spread of the gospel," is charitable (*y*), —as is also a trust to purchase land and build houses thereon, and thereafter to let the houses (*at easy rents*) to the poorer classes in populous districts (*z*); and a trust

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(*g*) *Farquhar* v. *Dowling*, 1896, 1 Ch. 50.
(*h*) *Yates* v. *University College*, L. R. 7 H. L. 438.
(*i*) *Jones* v. *Palmer*, 1895, 2 Ch. 649.
(*k*) *Faversham* (*Mayor*) v *Ryder*, 5 De G. M. & G. 350.
(*l*) *Loscombe* v. *Wintringham*, 13 Beav. 87.
(*m*) *Barclay* v. *Maskelyne*, 4 Jur. N. S. 1294.
(*n*) *Gosling* v. *Smith*, 1900, W. N. 15.
(*o*) *London University* v. *Yarrow*, 23 Beav. 159.
(*p*) *In re Scowcroft*, *Ormrod* v. *Wilkinson*, 1898, 2 Ch. 638.
(*q*) *In re Mann*, *Hardy* v. *Att.-Gen.*, 1903, 1 Ch. 232.
(*r*) *Att.-Gen* v. *Stepney*, 10 Ves. 22.
(*s*) *Cooper-Dean* v. *Stevens*, 41 Ch. D. 552.
(*t*) *Pease* v. *Pattinson*, 32 Ch. Div. 154.
(*u*) *Slevin* v. *Hepburn*, 1891, 2 Ch. 236.
(*x*) *Gordon* v. *Craigie*, 1907, 1 Ch. 382.
(*y*) *Lea* v. *Cooke*, 34 Ch. Div. 528.
(*z*) *Lewis* v. *Sutton*, 1901, 2 Ch. 640.

also for indigent male persons occupied in scientific pursuits (*a*).

Charitable schemes,—when and when not settled.

The Court in general settles a "*scheme*" for the administration of charitable bequests,—on a reference to chambers (*b*), and the Court may also afterwards (and from time to time) amend (*c*), or vary (*d*), the scheme so settled; but a scheme will not be directed, when the legatee is evidently intended by the testator to have an absolute discretion in his application of the fund (*e*). The Charity Commissioners may also settle schemes (*f*), —and may (with the aid of the Court) summarily enforce the provisions of these schemes (*g*),—and also from time to time, vary their schemes (*h*). But a charity which is supported entirely (*i*), or in part (*k*), by voluntary contributions is not liable to be controlled by the Commissioners,—*Scil.*, to the extent of such voluntary support; and sometimes the jurisdiction of the Commissioners has been wholly divested out of them, and vested in (*e.g.*) the Board of Education (*l*).

Litigation concerning the charity estate, —certificate of Commissioners to.

Although it is the Attorney-General who (most properly) enforces charitable trusts,—they being a matter of public concern,—still any private individual may do so, provided he first obtain the certificate of the Commissioners to do it (*m*): Which certificate may be obtained even pending the action (*n*); But the certificate is only required, where the administration of the charity estates is materially involved in the action,—the object of the certificate being to protect the estates of the charity.

(*a*) *Weir* v. *Brown*, 1908, A. C. 162.
(*b*) *Re Hyde Park Place Charity*, 1911, 1 Ch. 678.
(*c*) *Att.-Gen.* v. *Worcester* (*Bp.*), 9 Ha. 328.
(*d*) *In re Betton's Charity*, 1908, 1 Ch. 205.
(*e*) *Walsh* v. *Gladstone*, 1 Phil. 200.
(*f*) *The Weir Hospital*, 1910, W. N. 82.
(*g*) *John Street Chapel case*, 1893, 2 Ch. 618.
(*h*) *Re Mason Orphanage*, 1896, 1 Ch. 54, 596.
(*i*) *Re Clergy Orphan Corporation*, 1894, 3 Ch. 145.
(*k*) *Re Stockport Schools*, 1898, 2 Ch. 687.
(*l*) *Berkhamsted Grammar School case*, 1908, 2 Ch. 25.
(*m*) *Rooke* v. *Dawson*, 1895, 1 Ch. 480.
(*n*) *Rendall* v. *Blair*, 45 Ch. D. 139.

I. Respects in which charities are favoured,—

(I) Charities are favoured above individuals in the respects following:—

(1) General intention effectuated,—

(1) Firstly,—If the testator has expressed a general intention of charity, but has left uncertain the particular mode in which the intention is to be carried into effect, —or if the particular intention (as being, *e.g.*, for a superstitious use) is illegal (*o*),—the Court will uphold the intention of charity,—Because if any bequest be for a charity, and the purpose of charity be *paramount*,—it matters not that the objects are either uncertain or illegal. But, in all cases, the object must be distinctly charitable: For, if the bequest may be disposed of for any general purpose, whether charitable *or otherwise*—or for charitable *or other general purposes* at discretion,—the bequest will be void, as being not exclusively charitable (*p*). But if only the purpose be exclusively charitable, it will not render the gift void, merely to show, that there is (in fact) no such institute as that named in the will (*q*). Also, objects which are described as "charitable and deserving" (*r*), or as "charitable and benevolent" (*s*), will occasionally be construed simply as charitable objects, the added words being treated as merely restrictive (*r*), or being read *ejusdem generis* (*t*). But a gift expressed to be "for some one or more purposes, charitable or philanthropic" (*u*), or "for charitable, religious, or other societies" (*x*), would not be so construed,—but would be void as not being exclusively charitable.

Provided the intention is charitable.

Discretion,— in executors, as to choice of objects.

A testator sometimes leaves it to the discretion of his executors, to choose among his charitable objects; and he may do that well enough (*y*), if only he shows a *paramount* intention of charity (*z*); but in the absence of such paramount intention, the gift will (in such a case) be void for uncertainty (*a*). Also, where some of the objects

(*o*) *Cary* v. *Abbot*, 7 Ves. 490.
(*p*) *Morice* v. *Bishop of Durham*, 10 Ves. 522.
(*q*) *Hannen* v. *Hillyer*, 1902, 1 Ch. 876.
(*r*) *Obert* v. *Barrow*, 35 Ch. Div. 472.
(*s*) *Jarvis* v. *Birmingham Corporation*, 1904, 2 Ch. 354.
(*t*) *Hargreaves* v. *Taylor*, 1905, 2 Ch. 400.
(*u*) *In re Sidney*, 1908, 1 Ch. 126, 488.
(*x*) *In re Davidson*, 1909, 1 Ch. 567.
(*y*) *Crawford* v. *Forshaw*, 1891, 2 Ch. 261.
(*z*) *Gordon* v. *Craigie*, 1907, 1 Ch. 382.
(*a*) *Grimond* v *Grimond*, 1905, A. C. 104.

are charitable, and the others are not so, yet if *the executors have a discretion as to apportioning the bequest among the objects,* the bequest will be good as a charitable bequest (*b*). And here note, that a friendly society (being for the relief of poverty) will be (*c*), and otherwise it will not be (*d*), a charity; and a voluntary association (*e.g.*, a sisterhood) may be (or may not be) a charity, —or may be a charity in part only (*e*); but an advowson is not a charity, nor is its purchase a charitable object (*f*), —at least, in the general case (*g*). Also, the Livery Companies of London are not charities (*h*).

(1a) Doctrine of *Cy-pres.*

(1a) Where the literal execution of a charitable trust either originally is or afterwards becomes inexpedient or impracticable (that is to say, impossible (*i*)), the Court will execute the trust *cy-pres,*—that is to say, *as nearly as it can to the original purpose,*—the failure of the particular mode in which the charity is to be effectuated not destroying the charity (*j*). Also, if a legacy be given to a charity, and the charity survives the testator, but afterwards (and before receiving the legacy) ceases to exist, the legacy will be applied *cy-pres* (*k*). But if the charity has ceased (*l*),—that is to say, has wholly ceased (*m*),—to exist before the testator's death, or becomes *impossible* either before or after the death, the bequest will fail (*n*).

Limit to the *Cy-pres* doctrine.

The doctrine of *cy-pres* being applicable, only where the testator has manifested a paramount intention of charity,—If he has had but one *particular* object in his mind,—as, for example to build a church at W.,—and that object cannot be answered, the doctrine will not be

(*b*) *Salusbury* v. *Denton*, 3 K. & J. 529.
(*c*) *Bruty* v. *Mackay*, 1896, 2 Ch. 727.
(*d*) *Braithwaite* v. *Att.-Gen.*, 1909, 1 Ch. 510.
(*e*) *Cocks* v. *Manners*, L. R. 12 Eq. 574.
(*f*) *Hunter* v. *Att.-Gen.*, 1899, A. C. 309.
(*g*) *Lawrie* v. *Att.-Gen.*, 1904, 2 Ch. 643.
(*h*) *In re Meech, Butchers' Co.*, 1910, 1 Ch. 426.
(*i*) *The Weir Hospital*, 1910, 2 Ch. 124.
(*j*) *Moggridge* v. *Thackwell*, 7 Ves. 69; *Att.-Gen.* v. *The Ironmongers' Co.*, 2 Beav. 313.
(*k*) *Slevin* v. *Hepburn*, 1891, 2 Ch. 236.
(*l*) *Broadbent* v. *Barrow*, 29 Ch. D. 560; and distinguish *Moore* v. *Somerset*, 1909, 2 Ch. 410.
(*m*) *Hayward* v. *Att.-Gen.*, 1907, 1 Ch. 166.
(*n*) *Fowler* v. *Att.-Gen.*, 1909, W. N. 59.

applied (*o*); and if (*e.g.*) the bequest is upon trust to pay the income to the incumbent of the church of H. for the time being, so long as he permits the sittings to be occupied rent-free, there is no paramount intention of charity (*p*).

(2) Defects in conveyances supplied.

(2) Secondly,—In further aid of charities, the Court will supply all defects in conveyances (not being defects which are declared fatal by statute (*q*)),—although, in the case of private individuals, the imperfection in the conveyance (being in favour of a *volunteer*) would prevent the trust from arising.

(3) Resulting trusts in gifts to charities.

(3) Thirdly,—Charities are favoured, in respect of resulting trusts, the following rules being applicable in such a case, that is to say:—

(a) Where a person makes a valid gift (whether by deed or by will), and expresses a general intention of charity, but either particularises no objects (*r*), or such as do not exhaust the proceeds (*s*), the Court will not suffer the property in the first case, or the surplus in the second, to result to the settlor (or to his representatives), but will take upon itself to execute the general intention: And

(b) Where a person settles land for purposes which at the time exhaust the whole proceeds, but an *excess* of income subsequently arises, the Court will order the excess to be applied in the same or the like manner with the original amount (*t*). But

(c) If the settlor do not give the land (*Scil.*, the whole rent of the land) to the charity, but (noticing the land to be of a certain value) appropriates *part* only to the charity,—the surplus will result to the settlor (or to his heir-at-law or residuary devisee (*u*)); and such surplus will not be avail-

(*o*) *Broadbent* v. *Barrow*, 29 Ch. Div. 560.
(*p*) *In re Randell, Randell* v. *Dixon*, 38 Ch. Div. 213.
(*q*) *Sayer* v. *Sayer*, 7 Hare, 377; *Innes* v. *Sayer*, 3 Mac. & G. 660.
(*r*) *Att.-Gen.* v. *Herrick*, Amb. 712.
(*s*) *Att.-Gen.* v. *Tonna*, 2 Ves. Jr. 1.
(*t*) *Beverley* v. *Att.-Gen.*, 6 H. L. Ca. 310.
(*u*) *Att.-Gen.* v. *Trin. Coll. Camb.*, 24 Beav. 383.

able thereafter for the charity, even although the part appropriated should become insufficient for the charitable purpose (*x*).

(4) Fourthly,—Gifts to charities are not within (nor subject to) the Rule of Law against Perpetuities (*y*),—That is to say, where there is a valid immediate gift to one charity, a gift over to another charity is not subject to the rule (*z*). Nevertheless, an immediate gift, which is timed not to take effect until the happening of a contingency which is obnoxious to the rule of perpetuities, would be void, in the case of a charity equally as in the case of an individual (*a*); and a gift over to a charity following after a gift to an individual would also be void, if it was so limited as possibly not to take effect until the happening of some event which might not happen within the limits of the rule (*b*): Also, generally, if the gift is upon trust for the repair of some monument in a church (*c*), or is otherwise charitable, it is not subject to the rule; but if the gift is for a purpose not charitable (*d*), it is within and subject to the rule (*e*).

(4) Charities exempted from Rule of Perpetuities.

(5) Fifthly,—Voluntary conveyances of lands to charities were not within the 27 Eliz. cap. 4 (*f*), although the like conveyances, in the case of individuals, would have been void [as against subsequent purchasers and mortgagees],—*Scil.*, prior to the Voluntary Conveyances Act, 1893, which has now repealed the 27 Eliz. c. 4, as in the preceding chapter is stated.

(5) Voluntary conveyances to charities, good notwithstanding 27 Eliz. c. 4.

(II) Charities are treated on a level exactly with individuals in the respects following:—

II. Respects in which charities are treated on a level with private individuals.

(1) Firstly,—If a testator gives his property to such person as he shall name to be his executor, and he appoints no executor,—or if he appoints an executor, who dies in the testator's lifetime, and no other is appointed in his

(1) Want of executor supplied.

(*x*) *Att.-Gen.* v. *Gascoyne*, 2 My. & K. 647.
(*y*) *Thomas* v. *Howell*, L. R. 18 Eq. 198.
(*z*) *Christ's Hospital* v. *Grainger*, 1 Mac. & G. 460.
(*a*) *Chamberlain* v. *Brockett*, L. R. 8 Ch. App. 211.
(*b*) *Lloyd Phillips* v. *Davis*, 1893, 2 Ch. 491.
(*c*) *Hoare* v *Osborne*, L. R. 1 Eq 585.
(*d*) *Tyler* v. *Tyler*, 1891, 3 Ch. 252.
(*e*) *Thomson* v. *Shakespeare*, 1 De G. F. & J. 399.
(*f*) *Ramsay* v. *Gilchrist*, 1892, A. C. 412.

place,—In either of these two cases, and whether the bequest be in favour of a charity or of an individual, the Court will carry into effect that bequest,—That is to say, *will appoint a trustee to discharge the duties of the executor* (*g*), the beneficiary being certain, and only the legal owner uncertain (*h*).

(2) Lapse of time, a bar.

(2) Secondly,—Lapse of time is in equity a bar in the case of charitable trusts, exactly as it is (where it is) a bar in the case of mere private trusts,—For example, as regards the remedy for relief from a wrongful sale (*i*) or wrongful lease (*k*) of the charity lands,—In the case of the breach of an *express* trust of which the purchaser as lessee has notice, the lapse of time is, of course, no bar in either case (*l*). And under the Trustee Act, 1888 (*m*),—whereby, in certain cases, lapse of time may now (in favour even of the trustees themselves) be pleaded in bar of the action against them for a breach of trust, it will make no difference, *semble*, whether the trust is a private trust or is a public (or charitable) trust.

(3) Illegal, severance of, from legal.

(3) Thirdly,—Where there is a gift upon trust for charitable and other purposes, and the charitable purposes are legal, but the other purposes are illegal (whether by the common law or by statute (*n*)),—If the proportion attributable to the charitable purposes can be ascertained *and the legal separated from the illegal*, the Court will not suffer the intended charitable bequest to fail, but will uphold the gift, to the extent of the ascertainable proportion (*o*). On the other hand, if the proportion cannot be ascertained (or if the legal cannot be severed from the illegal), then (in the case of charities as in the case of individuals) the whole gift will either fail,—which, in the general case, it will do (*p*),—or else will enure in favour of the legal purposes exclusively,—which (on the true construction of the bequest) it will sometimes do (*q*).

(*g*) *M'Alpine* v. *Moore*, 21 Ch. Div. 778.
(*h*) *Mills* v. *Farmer*, 1 Mer. 55, 96.
(*i*) *St. Mary Magdalen* v. *Att.-Gen.*, 6 H. L. Ca. 189.
(*k*) *Att.-Gen.* v. *Davey*, 4 De G. & J. 136.
(*l*) *Att.-Gen.* v. *Christ's Hospital*, 3 My. & K. 344.
(*m*) 51 & 52 Vict. c. 59, s. 8.
(*n*) *Pickering* v. *Ilfracombe R. C.*, L. R. 3 C. P. 235.
(*o*) *Hoare* v. *Osborne*, L. R. 1 Eq. 585.
(*p*) *Chapman* v. *Brown*, 6 Ves. 404.
(*q*) *Fisk* v. *Att.-Gen.*, L. R. 4 Eq. 521.

And here note, that where the gift is upon trust for the joint (or equal) benefit of a charity and an individual, and both the charity and the individual are left indefinite, the whole gift will fail (*r*); but if the individual be definite and only the charity indefinite, the whole gift will be good,—the charity taking half the benefit, and the individual the other half of it (*s*). And further note, that where the gift is in ambiguous language, and (according to one interpretation of it) it is illegal, and (according to the other interpretation) it is legal, the legal interpretation will prevail,—in the case of charities as of individuals,—*ut res magis valeat quam pereat* (*t*).

(4) Accumulation of income, —trusts for, disregarded when title to *corpus* becomes indefeasible.

(4) Fourthly,—The rule in *Saunders* v. *Vautier* (*u*),—a rule which was approved in *Gosling* v. *Gosling* (*x*),—is equally applicable to donees who are charities as to donees who are private individuals: That is to say,—Wherever there is a gift (by deed or by will) to a charity or to an individual; and the gift is absolutely vested, but the payment over to the donee or legatee of the property comprised in the gift is postponed to a future day, with a direction to accumulate the income in the meantime,—In such a case, if *no one* (*save only the donee or legatee*) *has any interest in the accumulations*, the donee or legatee (whether a charity or an individual) may demand *immediate* payment: In other words, when a legacy is directed to accumulate for a certain period (say, till the legatee attains the age of twenty-five years), the legatee (if he has an absolute indefeasible interest) is not bound to wait until the expiration of the period, but may require payment the moment he is competent (*e.g.*, on attaining the age of twenty-one years) to give a valid discharge (*y*); and, of course, a charity is always competent to give such a discharge.

III. Two respects in

(III) Charities (compared with individuals) are (or

(*r*) *James* v. *Allen*, 3 Mer. 17.
(*s*) *Hunter* v. *Att.-Gen.*, 1899, A. C. 309.
(*t*) Shep. Touch. 80.
(*u*) Cr. & Ph. 240.
(*x*) John. 265.
(*y*) *Williams* v. *Williams*, 1907, 1 Ch. 180.

which charities are, or were, disfavoured,—

used to be) treated with an appearance of disfavour in the two following classes of cases, that is to say:—

(1) Assets used not to be marshalled in favour of charities,—

(1) Firstly,—Assets would not have been marshalled in their favour, because to do so would have been to offend against the Mortmain Acts, or (at all events) against the spirit of these Acts: Therefore, if a testator gave his real and personal estate to trustees, upon trust to sell; and (after payment of his debts and legacies) he bequeathed the residue of the mixed sale-proceeds to a charity,—Equity would not have thrown the debts and ordinary legacies upon the proceeds of sale of the real estate, in order to leave the pure personalty undiminished for the charity (*z*); but the rule of the Court was, to appropriate the mixed fund, as if no legal objection existed to applying any portion of it to the charity legacies, and then to hold such a proportion of the charity legacies to fail as would (in that way) have fallen to be paid out of the sale-proceeds of the real estate (*a*). But if the testator had himself (in such a case) directed the property to be marshalled in favour of the charity, the Court would have carried out his direction in a manner most favourable for the charity (*b*): Therefore, where a testator gave and devised the residue of his estate (both real and personal) to his trustees (whom he also appointed his executors), upon trust thereout in the first place to pay certain legacies to individual legatees, and as to the residue thereof,—or such part or parts thereof as might lawfully be appropriated for the purpose,—for such one or more specified charities and in such proportions as the trustees (in their uncontrolled discretion) might think fit,—The trustees were held entitled to appropriate the whole surplus to charities which were exempted from the disability of taking land by devise (*c*),—although, of course, the trustees could not appropriate any part of these proceeds to an unexempted charity (*d*).

Unless by express direction of the testator;

Or unless, in the case of charities authorised to take real estate by devise, under discretionary gifts to executors.

Marshalling in case of charitable legacies, —no necessity for, in future.

But all these rules as to marshalling now continue to be operative, only as regards the wills of testators who have died before the 5th August, 1891,—For by the

(*z*) *Ashworth* v. *Munn*, 34 Ch. Div. 391.
(*a*) *Williams* v. *Kershaw*, 1 Keen, 274, *n*.
(*b*) *Miles* v. *Harrison*, L. R. 9 Ch. App. 316.
(*c*) *Broadbent* v. *Barrow*, 31 Ch. Div. 113.
(*d*) *Whitwham* v. *Piercy*, 1898, 1 Ch. 565.

Mortmain and Charitable Uses Act, 1891 (*e*), it has been enacted (as regards the wills of testators who shall have died after that date), that (in effect) land may now be given by will to a charity (subject to the duty of selling it within a year); and that money secured on land, or arising out of or connected with land, shall not (as regards charitable bequests) be considered as land at all, within the Mortmain Acts (*f*); and that, where money is given by will to a charity, with a direction superadded to lay the money out in land, the gift shall be good, and the superadded direction only shall be void: Also, the Court may (by order) authorise the retention of the land unsold (*g*) or the acquisition of the land directed to be purchased (*h*), —*Scil.*, where it is wanted for occupation by the charity; and the Court may also, in a proper case, extend the time for selling the land (*i*).

(2) Gifts to charities of an obnoxious character, not allowed to be valid.

(2) Secondly,—Charitable purposes must be such generally as offend neither against any statute nor against the common sense of the country (morally and politically) for the time being: Wherefore, gifts for superstitious purposes,—*e.g.*, for saying masses for the dead,—have long been (and still are) deemed void, as offending against the statutes 23 Hen. VIII. c. 10 and 1 Edw. VI. c. 14, and as offending also against the (for the time being) prevailing moral and political sense of the country (*k*),—and that is so, notwithstanding the statute 23 & 24 Vict. c. 134, regulating Roman Catholic charities. Also, a gift for the total suppression of vivisection, is a gift which rather offends the moral sense of the public (*l*),—and so is deemed void: But doubtless, all these purposes (or some of them) will in time cease to be deemed offensive, and may even come to recommend themselves to the public conscience,—In which latter case, the gifts in aid of them will become valid charitable bequests. But note, that as regards gifts to individuals, there is no room for the public conscience to interfere,—however undesirable a person the individual legatee may be.

(*e*) 54 & 55 Vict. c. 73.
(*f*) *Douglas* v. *Simpson*, 1905, 1 Ch. 279.
(*g*) *Beeley* v. *Sidebottom*, 1902, 2 Ch. 389.
(*h*) *Brompton Hospital* v. *Lewis*, 1894, 1 Ch. 297.
(*i*) *In re Ryland*, *Roper* v. *Ryland*, 1903, 1 Ch. 467.
(*k*) *Heath* v. *Chapman*, 2 Drew. 417.
(*l*) *Cross* v. *London Anti-Vivisection Society*, 1895, 2 Ch. 501.

CHAPTER IV.

IMPLIED AND RESULTING TRUSTS.

An implied trust is a trust founded upon the unexpressed but presumed (*i.e.*, implied) intention of the party; and there are the five following principal varieties of it, viz.:—

(1) Resulting trust to purchaser upon conveyance to stranger.

(1) *The trust which results to the actual purchaser of property, where he procures it to be conveyed to a stranger.*—Lands (whether freehold, copyhold, or leasehold), when purchased by A.B., and (by his direction) conveyed to C.D., remain (in equity) the property of A.B.,—So that C.D. is but a trustee for A.B. (*a*). And this doctrine is applicable also to pure personal estate (*b*). And the doctrine is, of course, applicable also to the case, where two or more persons advance the purchase-money jointly and the purchase is taken in the name of one of them only,—For there will (in that case also) be a resulting trust in favour of both or all of them proportioned to the money which they have respectively advanced (*c*).

And where the advance of the purchase-money by the real purchaser does not appear on the face of the deed (and even if the deed states it to have been made by the nominal purchaser), parol evidence is admissible, to show the actual purchaser,—*i.e.*, to prove by whom the advance was actually made (*d*): Which evidence merely shows, that the nominal or ostensible purchaser was (in a sense) but the *agent* of (or a mere name for) the true purchaser, —a purpose for which parol evidence is always admissible: But if the agent for A.B. purchases in his (the

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(*a*) *Dyer* v. *Dyer*, 2 Cox, 92.
(*b*) *Ebrand* v. *Dancer*, 2 Ch. Ca. 26.
(*c*) *Wray* v. *Steele*, 2 V. & B. 388.
(*d*) *Heard* v. *Pilley*, L. R. 4 Ch. App. 548.

agent's) own name, and pays also the purchase-money out of his (the agent's) own moneys, and the lands are conveyed to him (the agent),—The principal cannot (in such a case) claim the lands as upon a trust for himself,—*Scil.*, because the Statute of Frauds prevents him from doing that (*e*),—*Scil.*, unless where it would be a fraud in the agent to keep the purchase for himself (*f*).

No resulting trust which would defeat the policy of the law.

No trust will result, however, in these cases, where it would be against public policy to permit the presumption,—As where the subject-matter of the conveyance is a British ship (*g*); or is land given to qualify the grantee to vote at a Parliamentary election (*h*); or is money deposited in a third party's name in evasion of the Savings Bank Acts (*i*),—In all which cases, the apparent donee will, therefore, retain the benefit for himself. But, as regards a policy of life-assurance (which is void for *want of interest*), if the Insurance Office (waiving that original illegality) actually pays over the policy-moneys, these moneys will be and remain the property of the person entitled to give the legal receipt for them (*k*).

Resulting trust may be rebutted by evidence of purchaser's intention;

e.g., By the contrary presumption of advancement.

(a) In whose favour the presumption of advancement will be raised.

Resulting trusts arise only by presumption of equity; and they may, therefore, be rebutted by parol evidence to the contrary: For example, if the true purchaser is under a legal obligation to maintain (or to otherwise provide for) the person in whose name the conveyance is taken,—as in the case of purchases taken in the names of children,—There will, in general, be no resulting trust for the actual purchaser in such a case; but the contrary presumption will arise, that an *advancement* was intended (*l*). And, generally, this contrary presumption of *advancement* will be raised, not only in favour of a legitimate child (*m*) (including, *now*, the children of a

(*e*) *Bartlett* v. *Pickergill*, 1 Eden. 515; *James* v. *Smith*, 1891, 1 Ch. 384.
(*f*) *Young* v. *Peachey*, 2 Atk. 254.
(*g*) *Holderness* v. *Lampert*, 29 Beav. 129.
(*h*) *Childers* v. *Childers*, 1 De G. & J. 482.
(*i*) *Field* v. *Lonsdale*, 13 Beav. 78.
(*k*) *Att.-Gen.* v. *Murray*, 1903, 2 K. B. 64.
(*l*) *Whitehouse* v. *Edwards*, 37 Ch. Div. 683.
(*m*) *Sidmouth* v. *Sidmouth*, 2 Beav. 447; *Dyer* v. *Dyer*, 2 Cox, 92.

second wife who was a sister of the deceased first wife (*n*)), but also in favour of all children whomsoever *towards whom the person advancing the purchase-money has placed himself in loco parentis* (*o*): For example, in *Beckford* v. *Beckford* (*p*), an illegitimate son; in *Ebrand* v. *Dancer* (*q*), a grandchild (whose father was dead); in *Currant* v. *Jago* (*r*), the *nephew* of a wife; and in *Standing* v. *Bowring* (*s*), a godson. And the presumption will also arise in favour of a wife (*t*),—*Scil.*, who is such at the date of the purchase, although the marriage should afterwards be dissolved or declared null (*u*),—and as between a widowed mother and her invalid daughter (*x*).

(b) In whose favour the presumption will not be raised.

But the presumption has not yet been extended to the illegitimate children of the daughter of the purchaser (*y*), nor to the sister of the wife of the purchaser (*z*). Nor will the presumption arise, when the purchaser makes the purchase in the names of himself and a woman (or in the name of the woman alone), with whom he has contracted an illegal marriage,—as, formerly, in the case of a deceased wife's sister (*a*); or with whom he has contracted no marriage at all,—as in the case of a mere kept woman (*b*). And similarly, where a woman (who was a widow) kept a man, the presumption of advancement was repelled (*c*). Also, where A.B. (a spinster) was entitled to a leasehold property,—and she mortgaged it, and then afterwards married C.D.; and C.D., during the marriage, paid off part of the mortgage debt (out of his own moneys), and then died leaving A.B. surviving,—the part payment off was *not deemed an advancement*

(*n*) *Green* v. *Meinall*, 1911, W. N. 137.
(*o*) *Standing* v. *Bowring*, 31 Ch. D. 282.
(*p*) Lofft, 490.
(*q*) 2 Ch. Ca. 26.
(*r*) 1 Coll. 261.
(*s*) 31 Ch. Div. 282.
(*t*) *Drew* v. *Martin*, 2 H. & M. 130.
(*u*) *Dunbar* v. *Dunbar*, 1909, P. 90.
(*x*) *Sayre* v. *Hughes*, L. R. 5 Eq. 380.
(*y*) *Tucker* v. *Burrow*, 2 H. & M. 515.
(*z*) *In re Scottish Equitable Life Policy*, 1902, 1 Ch. 282.
(*a*) *Soar* v. *Foster*, 4 K. & J. 152; and (now) 7 Edw. VII. c. 47.
(*b*) *Rider* v. *Kidder*, 10 Ves. 360.
(*c*) *James* v. *Holmes*, 4 De G. F. & J. 470.

by C.D. for A.B.'s benefit,—and was therefore recouped to C.D.'s estate (*d*).

Mother is different from father,—liability being different.

If a lawfully married woman should purchase in the name of her lawful child (*e*),—whom, of course, she is not bound to maintain or to provide for (*f*),—or should purchase in the name of her lawful husband (*g*),—That would not be deemed an advancement of the child or of the husband,—*Scil.*, unless an express intention in that behalf was proved: And the law has not, in this particular, been altered by the Married Women's Property Act, 1882 (*h*), notwithstanding that, by that Act (ss. 20, 21), a married woman (having separate property under the Act) is now laid under a contingent liability to maintain her husband, and also her lawful children (*i*),—*Scil.*, because such statutory contingent liability is of a very limited character, and does not extend further than the statute expresses (*k*). And although the statutory liability has now been extended to include the father and also the mother of the married woman (*l*), still the liability continues to be of the same limited character.

The presumption of advancement is rebuttable by parol evidence.

And just as the presumption of a resulting trust may be rebutted, so also the presumption of advancement may be rebutted; and facts *antecedent* to (or *contemporaneous* with) the purchase (or so immediately after it as to constitute a part of the transaction) may properly be given in evidence for this purpose: In other words, evidence is admissible, for the purpose either of rebutting the presumption of advancement (*m*) or of supporting that presumption (*n*). But facts *subsequent*, consisting of the acts and declarations of the father, although they may be used in evidence by the son, cannot be used in evidence by the father (*o*): Wherefore, the presumption of ad-

(*d*) *Pitt* v. *Pitt*, T. & R. 180.
(*e*) *In re De Visme*, 2 De G. J. & S. 17.
(*f*) *Holt* v. *Frederick*, 2 P. Wms. 356.
(*g*) *Mercier* v. *Mercier*, 1903, 2 Ch. 98.
(*h*) 45 & 46 Vict. c. 75.
(*i*) *Bennett* v. *Bennett*, 10 Ch. Div. 474.
(*k*) *Pontypool Guardians* v. *Buck*, 1906, 2 K. B. 896.
(*l*) 8 Edw. VII. c. 27, s. 1.
(*m*) *Stock* v. *McAvoy*, L. R. 15 Eq. 55.
(*n*) *Lamplugh* v. *Lamplugh*, 1 P. Wms. 113.
(*o*) *Reddington* v. *Reddington*, 3 Ridg. P. C. 195, 197.

vancement will not be rebutted, by the mere circumstance that the father (*subsequently* to the purchase) retains the property under his control, and receives the rents and profits (*p*), or the dividends and interest (*q*),—and continues so to do *even after the son has ceased to be a minor*. On the other hand, the *subsequent* acts and declarations of the son may (apparently) be used by the father,—at least, where there is nothing showing the intention of the father (at the time of the purchase) sufficient to counteract the effect of those declarations (*r*).

It has been considered, that if the son has been already fully advanced and provided for, that is a strong circumstance against the presumption of a further advancement in his favour (*s*): Also, where the son was the solicitor of the father, that circumstance alone was sufficient to defeat the presumption of advancement (*t*); and considerations of mere convenience even, may defeat the presumption (*u*),—especially in the case of the opening of banking accounts (*x*), or in the payment off (or reduction) of a mortgage debt on settled estates (*y*).

Where the case is not one of the original purchase of land or of goods by A. in the name of B., but is the case merely of a conveyance by A. to B. of land already vested in A. (*z*),—or is the case merely of a transfer by A. to B. of stocks or shares already standing in the name of A. (*a*),—The presumption of a gift to B. is almost irrebuttable. Conversely, where there is a purported conveyance by deed from A. to B., but the deed is void (and wholly inoperative) by reason of (*e.g.*) the Mortmain Act,—the property simply reverts to (and revests in) A.,—and B. has no title to it whatever,—*Scil.*, until he acquires a title to it by long possession (*b*).

(*p*) *Grey* v. *Grey*, 2 Swanst. 594; *Byrne's case*, 1911, A. C. 386.
(*q*) *Batstone* v. *Salter*, L. R. 19 Eq. 250.
(*r*) *Scawin* v. *Scawin*, 1 Y. & C. C. C. 65.
(*s*) *Hepworth* v. *Hepworth*, L. R. 11 Eq. 10.
(*t*) *Garrett* v. *Wilkinson*, 2 De G. & Sm. 244.
(*u*) *Marshall* v. *Cruttwell*, L. R. 20 Eq. 328.
(*x*) *Tye* v. *Sullivan*, 28 Ch. D. 705.
(*y*) *Harvey* v. *Hobday*, 1896, 1 Ch. 137.
(*z*) *Fowkes* v. *Pascoe*, L. R. 10 Ch. App. 343.
(*a*) *Batstone* v. *Salter*, *supra*.
(*b*) *Churcher* v. *Martin*, 42 Ch. D. 312.

(2) *Resulting Trust of Unexhausted Residue.*—Where a settlor (by deed or will) conveys property on trusts which do not exhaust the whole, there will, in general (*c*), —but not invariably (*d*),—be a resulting trust (as regards the surplus) in favour of the settlor,—or (if the settlor be dead) in favour of his heir (or residuary devisee) and next of kin (or residuary legatee): And this rule is applicable also to co-settlors, equally as to a single settlor (*e*),—although if the co-settlors are unusually numerous, the presumption of a resulting trust in their favour is weak (*f*). (2) Resulting trust of unexhausted residue.

Where three estates, A., B., and C., were devised to trustees, and the will declared trusts of one of the three estates only, the other two estates were held to result to the testator,—and passed to his residuary devisee (*g*). And, generally, although the words of the conveyance should be ever so absolute, yet if the purpose of it was, from the first, capable of being satisfied,—and is, in fact, afterwards satisfied,—without exhausting the whole, there will, —in general (*h*),—although not invariably (*i*),—be a resulting trust of the surplus.

Where a trust is created (by deed or will) in favour of an individual, who is (or who must be presumed to be) alive when the deed or will first operates, there is no resulting trust, merely because that individual dies or disappears,—but his representatives will be entitled (*k*), and not the trustee: And, generally, it is, in all cases, necessary to observe the following distinction, namely,— Firstly, that where property is given simply upon trust, the trustee is excluded from taking beneficially; but, secondly, that where property is given subject only to a *charge*, the donee of it takes it beneficially after satisfying the charge,—a devise *upon trust* and a devise subject

Devise with a charge,—devisee takes beneficially.

Devise on trust,—devisee takes no benefit.

(*c*) *Parnell* v. *Hingston*, 3 Sm. & Giff. 344.
(*d*) *Cooke* v. *Smith*, 1891, A. C. 297.
(*e*) *Smith* v. *Abbott*, 1900, 2 Ch. 326.
(*f*) *Carter* v. *Andrew*, 1905, 2 Ch. 48.
(*g*) *Patrick* v. *Simpson*, 24 Q. B. D. 123.
(*h*) *Salt* v. *Northampton*, 1892, A. C. 1.
(*i*) *Cooke* v. *Smith*, 1891, A. C. 297.
(*k*) *In re Corbishley's Trust*, 14 Ch. Div. 846.

to a *charge* being wholly different things, both in themselves, and also as regards their respective operations.

Death of settlor, intestate and without representatives.

Where the resulting trust is under a will, and there is no one in whose favour the trust can result,—That is to say, no heir as to the realty; and no next of kin as to the personalty,—Then (prior to the Intestates' Estates Act, 1884), the rule used to be, that as to the realty the trustee (*l*) or legal mortgagee in fee (*m*) took beneficially,—*Scil.*, because the legal estate in him excluded the crown's title by escheat,—or (in the case of copyholds) the lord's title by escheat (*n*). But, now, under and by force of the Intestates' Estates Act, 1884 (*o*), which came into force the 14th day of August, 1884, the "real estate" would in all these cases now escheat to the crown,—or (in the case of copyholds) to the lord; and the Act extends to the unexhausted residue of the proceeds of the sale of real estate (*p*); and to money directed to be converted into real estate,—such money being "*equitable realty*" within the fourth section of the Act. Also, where lands are conveyed, whether by deed (*q*) or by will (*r*), to trustees in fee simple, upon trust for C.D. in fee simple,—but C.D. is an alien, and not within the provisions of the Naturalisation Act, 1870 (33 & 34 Vict. c. 14), s. 2,—although the legal estate remains in the trustees, yet the trust accrues to the crown (*q*).

(a) As to realty, trustee used to take for his own benefit; Crown, or lord, now entitled in all cases.

(b) As to pure personalty, the crown, or lord, takes as *bona vacantia*.

And as to pure personal estate (*s*), including leaseholds (*t*), and capital moneys liable (under the Settled Land Act, 1882) to be re-invested in land (*u*), the crown (by virtue of its prerogative) or the lord (by virtue of his franchise) is entitled thereto as to *bona vacantia*,—Subject only to this, namely, that where the executor is exe-

(*l*) *Burgess* v. *Wheate*, 1 Eden. 177.
(*m*) *Beale* v. *Symonds*, 16 Beav. 406.
(*n*) *Moody* v. *Penfold*, 1891, 1 Ch. 258.
(*o*) 47 & 48 Vict. c. 71.
(*p*) *Att.-Gen.* v. *Anderson*, 1896, 2 Ch. 596.
(*q*) *Sharp* v. *St. Sauveur*, L. R. 7 Ch. App. 351.
(*r*) *Barrow* v. *Wadkin*, 24 Beav. 1.
(*s*) *In re Gosman*, 15 Ch. Div. 67.
(*t*) *Middleton* v. *Spicer*, 1 Bro. C. C. 201.
(*u*) *Panes* v. *Att.-Gen.*, 1901, 1 Ch. 15.

cutor simply (and is not also a trustee), then the executor still takes beneficially the unexhausted residue (*x*).

In all cases, subject to the debts, costs, &c.

However, in all these cases, whether the crown or the lord is entitled, and whether to the real (*y*) or to the personal (*z*) estate,—or whether the executor is entitled to the personal estate,—In every case, the title taken, is taken subject to the debts of the deceased being first paid out of the property taken, and to all the "testamentary expenses" (including the estate duty) being also first paid thereout.

(3) Executors took undisposed of residue before 1 Will. IV. c. 40,—now trustees for representatives of deceased.

(3) *Executors as Trustees of Residue.*—Where a testator made no express disposition of the residue of his personal estate, the executors used to be entitled to it,—subject only to the debts being paid. But an intention to exclude the executors might appear on the will; and such intention would be inferred where an express legacy was given to them,—or (in the case of two or more executors) if equal legacies were expressly given to both or all of them (*a*). And the statute 1 Will. IV. c. 40 has now enacted, that (as to wills made after the 1st September, 1830) the executors shall be deemed to be trustees for the persons (if any) who would be entitled (under the Statutes of Distribution) in respect of any residue not effectually disposed of by the will,—Unless it shall appear by the will itself, that the executors are intended to take such residue beneficially,—The effect of the statute being, to put upon the executors the onus of proving, that the testator intended them to take beneficially (*as against, or in exclusion of, the next of kin* (*b*)). But if, in such a case, it should happen that there are no next of kin, the 1 Will. IV. c. 40, will be inapplicable,—So that (in such a case) the executor will (*as against the crown*) continue to be beneficially entitled to the unexhausted residue (*c*).

(4) Resulting trusts under the doctrine of conversion.

(4) *Resulting Trusts under the Doctrine of Conversion.*—These are considered in Chapter IX., *infra*.

(*x*) *Camp* v. *Coe*, 31 Ch. Div. 460.
(*y*) *Bowles* v. *Hyatt*, 38 Ch. D. 609.
(*z*) *Megit* v. *Johnson*, 2 Doug. 542.
(*a*) *Att.-Gen.* v. *Jefferys*, 1908, A. C. 411.
(*b*) *Harrison* v. *Harrison*, 2 H. & M. 237.
(*c*) *In re Lacy*, 1899, 2 Ch. 149.

(5) Implied trusts arising out of joint tenancies.

(5) *Resulting Trusts in the Case of Joint Tenancies.*—Where two or more persons purchase lands, and advance the money in *equal* shares, and the conveyance is taken to them and their heirs, they will be joint tenants both at law and in equity; and (upon the death of one of them) the estate will go to the survivor,—*Scil.*, unless there has been a severance of the jointure in the meantime (*d*). But equity, it will be remembered, always leans strongly against joint tenancy (with its one-sided incident of survivorship): Therefore, firstly, where two or more persons purchase lands and advance the purchase-moneys in *unequal* proportions, and this appears on the deed itself, the survivor will be deemed in equity a trustee for the other, in proportion to the sum advanced by him (*e*). And, secondly, where money is advanced by way of loan, either in *equal* or *unequal* shares, there will in equity be no survivorship,—although the mortgage should be joint (*f*); and if the mortgagees should afterwards purchase the equity of redemption, they will hold it as tenants in common, even although it should have been conveyed to them jointly (*g*).

Slight circumstances defeat survivorship in equity.

And the same rule is applicable, generally, to joint purchases by partners in trade,—this being in furtherance of the common law maxim, *Jus accrescendi inter mercatores pro beneficio commercii locum non habet:* But lands which have been *devised* in joint tenancy to partners will continue to belong to the partners in joint tenancy, both at law and in equity (*h*),—*Scil.*, unless where an intention to the contrary can be inferred from their subsequent mode of dealing with the land,—as if, in their yearly accounts, they have consistently treated the devised land as *assets of the partnership* (*i*). And similarly, there will be no survivorship in the case of partners who are joint patentees (*k*).

(*d*) *Palmer* v. *Rich*, 1897, 1 Ch. 134.
(*e*) *Lake* v. *Craddock*, 3 P. Wms. 157.
(*f*) *Morley* v. *Bird*, 3 Ves. 631.
(*g*) *Aveling* v. *Knipe*, 19 Ves. 440.
(*h*) *Balmain* v. *Shore*, 9 Ves. 500.
(*i*) *Waterer* v. *Waterer*, L. R. 15 Eq. 402.
(*k*) 7 Edw. VII. c. 28, s. 1; and c. 29, s. 37.

CHAPTER V.

CONSTRUCTIVE TRUSTS.

A CONSTRUCTIVE trust is a trust raised by *construction* of equity, without reference to (and irrespectively of) any intention of the parties; and there are the five following principal varieties of it, viz.:—

(1) Lien on land sold,—

(a) Vendor's lien for unpaid purchase-money.

(1) *The Vendor's Lien on Land.*—This lien is for the amount of the unpaid purchase-money of the land sold; and although that purchase-money should purport, *upon the face of the purchase-deed and even by the receipt indorsed thereon*, to have been paid, yet if the money (or part of it) has not been paid in fact, a lien shall prevail for the money which remains unpaid (*a*): Which lien, although it is a charge in equity only, is (for all purposes) real estate (*b*), and may be enforced and realised accordingly.

Waiver or abandonment of lien,—what is, and what is not.

The lien may, of course, be waived; but a mere personal security for the unpaid purchase-money (*e.g.*, a bond (*c*), or a bill of exchange or a promissory note (*d*), or a mere ledger-entry of payment (*e*)),—or the granting of an annuity secured by bond or covenant (*f*),—will not, of itself, be sufficient to discharge the lien. But if the circumstances show an intention, to look merely to the personal credit of the purchaser,—as if it appears, that the note, bond, entry, covenant, or annuity was *substituted* for the consideration-money (*g*),—or was, in fact,

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(*a*) *Mackreth* v. *Symmons*, 15 Ves. 328.
(*b*) *Maddison* v. *Chapman*, 1 J. & H. 470.
(*c*) *Collins* v. *Collins*, 31 Beav. 346.
(*d*) *Hughes* v. *Kearney*, 1 Sch. & Lefr. 135.
(*e*) *Wrout* v. *Dawes*, 25 Beav. 369.
(*f*) *Clarke* v. *Royle*, 3 Sim. 499.
(*g*) *Fawell* v. *Heelis*, 2 Dick. 485.

the consideration bargained for,—The lien will be gone; and the vendor's remedy will (in that case) be on the note, bond, entry, or covenant only (*h*), and will not be by suit in equity to enforce or to realise his lien (*i*). But where the purchase-money assumes the form of an annuity, the presumption rather is against the lien continuing (*k*); and the lien will not continue where, for example, the intention was, that the vendor should receive payment out of the sale-proceeds to be received by the purchaser (on his re-sale of the property), or out of moneys to be raised by the purchaser on his mortgage of the property,—*the intention of making* such a re-sale or such a mortgage being incompatible with the continued existence of the lien (*l*).

Against whom the lien is or is not enforced.

The vendor's lien binds the estate in the hands of the following individuals, namely:—

(1) The purchaser himself, and his heirs, and all persons taking under him or them as volunteers;

(2) Subsequent purchasers for valuable consideration, who buy *with notice* of the purchase-money remaining unpaid (*m*); and

(3) The assignee (*i.e.*, trustee) in bankruptcy of the purchaser,—for such assignee or trustee takes subject to all the equities affecting the bankrupt (*n*); Also,

(4) Where the first purchaser has sold the estate to a *bonâ fide* second purchaser without notice, if and so long as the second purchase-money (or part thereof) has not yet been paid, the original vendor may proceed either against the estate for his lien, or against the second unpaid purchase-money,—For (in such a case) the second purchaser, not having yet paid his full purchase-money, becomes, on getting notice of the lien before he pays it, a purchaser *with notice* (to

(*h*) *Buckland* v. *Pocknell*, 13 Sim. 406.
(*i*) *Nives* v. *Nives*, 15 Ch. Div. 649.
(*k*) *Dixon* v. *Gayfere*, 1 De G. & J. 655.
(*l*) *In re Brentwood Brick Co.*, 4 Ch. D. 562.
(*m*) *Morris* v. *Chambers*, 29 Beav. 246.
(*n*) *Ex parte Golding*, *In re Knight*, 13 Ch. Div. 628.

the extent that his purchase-money is unpaid), —and so becomes (in effect) a trustee for the original vendor, for the purpose of securing payment to him of the unpaid portion of the original purchase-money (*o*). And the law is the same where a bond has been given for the unpaid balance of the purchase-money (*p*): Also,

(5) If the legal estate be outstanding, the second purchaser for value (whether with or without notice) has only an equitable interest,—and will therefore, in general, be postponed to the equitable lien,—For, "*Qui prior est tempore potior est jure.*"

The lien will, of course, not prevail against a *bonâ fide* second purchaser for valuable consideration without notice, who obtains the legal estate,—*Scil.*, because "Where the equities are equal, the law shall prevail." A vendor may also find his lien postponed through his own negligence; for in *Rice* v. *Rice*, as was mentioned on p. 10, *supra*, the defendants (the equitable mortgagees), although having only an equity, were held entitled (although *posterior* in date) to payment out of the estate in priority to the vendor,—on the ground of the negligence of that vendor. Moreover, a vendor's lien will, occasionally, be discharged and extinguished, by the Statutes of Limitation (*q*). And it has now been provided, generally, by the Conveyancing Act, 1881 (*r*), s. 55, that (*so far as regards a purchaser who subsequently buys an estate that remains subject to the lien of a previous vendor for his unpaid purchase-money*) the acknowledgment in the body of the deed of the purchase-money having been paid, or the receipt for it on the back of the deed,—the acknowledgment or receipt being duly executed, and being in or on a deed executed after the 31st December, 1881,—shall protect him (being a *bonâ fide* purchaser) against such lien; and the term "purchaser" includes (for this purpose) a subsequent mortgagee,—and also his sub-mortgagee.

Conveyancing Act, 1881,—provisions of, as to vendor's lien.

(*o*) *Fawell* v. *Heelis*, Amb. 724.
(*p*) *Tourville* v. *Naish*, 3 P. Wms. 306.
(*q*) *Toft* v. *Stephenson*, 5 De G. M. & G. 735.
(*r*) 44 & 45 Vict. c. 41.

(b) Vendee's lien for purchase-money, —paid in whole or in part.

(1b) *The Vendee's Lien on Land.*—Somewhat analogous to the lien of the vendor for his unpaid purchase-money, is the lien of the vendee upon the estate in the hands of the vendor for any instalment of his purchase-money already actually paid (*s*),—*Scil.*, where the purchase (through no fault of the purchaser) goes off: And this lien of the purchaser will exist, not only as against the vendor, but also as against a *subsequent* mortgagee with notice (*t*),—and in fact, generally, against all the like persons above enumerated, against whom the vendor's lien would prevail; and it extends also to include interest on the instalment or deposit paid, and all the costs and expenses (thrown away) of the purchaser. But the purchaser's lien will not, of course, prevail against a prior mortgagee (whether legal or equitable). Also, note, that the lien of the unpaid vendor (or, *semble*, of the paying purchaser) holds good also upon a sale (or purchase) of chattels (*u*),—at least, of specific chattels (such as a ship in the course of building),—*Scil.*, where the contract is specifically enforceable (*x*); and it holds good also as to leaseholds (*y*); and as to the profits from patent-rights (*z*), and the like.

Registration of vendor's lien,—none in Middlesex; *Secus*,—in Yorkshire.

As regards lands in a Register County,—No provision exists for the registry of a vendor's lien on lands in Middlesex; and therefore the lien on lands in Middlesex, although it is unregistered, holds good (*a*). But as regards lands in Yorkshire (not being, of course, lands of copyhold tenure), it has now been provided, by the Yorkshire Registries Act, 1884 (*b*), s. 7, as regards any lien arising on or after 1st January, 1885, that a memorandum of such lien not only *may*, but *must*, be registered,—for that no such lien shall (unless and until a memorandum of it is registered) have any priority as against any purchase deed (or mortgage deed) duly registered; but the Act makes, of course, an exception in the case of

(*s*) *Turner* v. *Marriott*, L. R. 3 Eq. 744.
(*t*) *Watson* v. *Rose*, 10 H. L. Ca. 672; *Whitbread* v. *Watt*, 1902, 1 Ch. 835.
(*u*) *Collins* v. *Collins*, 31 Beav. 346.
(*x*) *Stueley* v. *Kekewich*, 1906, 1 Ch. 67.
(*y*) *Davies* v. *Thomas*, 1900, 2 Ch. 462.
(*z*) *Dansk* v. *Snell*, 1908, 2 Ch. 127.
(*a*) *Kettlewell* v. *Watson*, 26 Ch. D. 501.
(*b*) 47 & 48 Vict. c. 54, amended by 48 & 49 Vict. cc. 4, 26.

fraud,—*Scil.*, fraud actual (*c*), and not merely constructive (*d*).

(2) Renewal of lease by a trustee in his own name;

(2) *Renewal of Lease by Fiduciary Lessee.*—Upon the renewal of a lease by a trustee or executor, although in his own name and professedly for his own benefit,—and even upon the refusal of the lessor to grant a new lease to the *cestui que trust* (*e*),—the renewed lease shall be held upon trust for the persons entitled to the old lease (*f*), —and that, whether the lease is a renewable lease or is not a renewable lease (*g*). And this rule is applicable also (but as regards renewable leases only, and not also ordinary leases (*h*)) to persons having limited interests in the lease: Therefore, a tenant for life, who renews the lease in his own name, will (subject to his own life interest therein) be a trustee of the renewed lease for those entitled in remainder (*i*); and the rule is applicable (but as regards *renewable* leases only, and not also ordinary leases (*k*)), if the tenant for life purchases the fee simple reversion on the lease (*l*),—or purchases adjoining land under a right of pre-emption annexed to the original settled land (*m*),—For it is but fair, that a tenant for life, who gets some special benefit through the advantage of his own possession, should share that benefit with the remaindermen.

or by tenant for life;

Also, if a partner renews a lease of the partnership premises on his own account, he will, in general, be a trustee of it for the firm (*n*): And the like rule applies to a mortgagor (*o*), and to a mortgagee (*p*), renewing a lease of the mortgaged premises: And the rule applies, generally, to all persons occupying fiduciary or quasi-

or by a partner.

(*c*) *Battison* v. *Hobson*, 1896, 2 Ch. 403.
(*d*) *Native Lands case*, 1905, A. C. 176.
(*e*) *Keech* v. *Sandford*, Cha. Ca. 61.
(*f*) *Pilgrem* v. *Pilgrem*, 18 Ch. Div. 93.
(*g*) *Randall* v. *Russell*, 3 Mer. 190.
(*h*) *Bevan* v. *Webb*, 1905, 1 Ch. 620.
(*i*) *In re Lord Ranelagh's Will*, 26 Ch. Div. 590.
(*k*) *Bevan* v. *Webb*, *supra*.
(*l*) *Phillips* v. *Phillips*, 29 Ch. Div. 673.
(*m*) *Rowley* v. *Ginnever*, 1897, 2 Ch 503.
(*n*) *Clegg* v. *Fishwick*, 1 Mac. & G. 394.
(*o*) *Leigh* v. *Burnett*, 29 Ch. Div. 231.
(*p*) *Holt* v. *Holt*, 1 Ch. Ca. 190.

Settled Land Act, 1882,—tenant for life under.

fiduciary relations (*q*). Also, by the Settled Land Act, 1882 (*r*), s. 53, a tenant for life, in exercising any power under the Act, is to have regard to the interests of all parties entitled under the settlement,—and is to be deemed in the position of a trustee for those parties: And, accordingly, he is (as regards, *e.g.*, the exercise of his discretionary powers) restrainable by the Court, exactly as a trustee would be (*s*); and he may not sell at an undervalue,—being a conscious undervalue (*t*); and, in the exercise of his statutory powers, he may not lease or sell to himself (*u*),—although, in the exercise of an express power of leasing (or of selling), he might (possibly) have leased (or sold) to himself (*x*).

Co-tenants,—case of.

But, *nota bene*, one of a group of next of kin, whose intestate was entitled to a lease (even, *semble*, a renewable lease), may keep for his own benefit any new lease which he may obtain of the demised premises (*y*); and one of several joint tenants is (apparently) no longer to be deemed in a fiduciary relation towards his co-tenants (*z*), —although the contrary used always to be supposed (*a*), —*Scil.*, as regards only renewable leases.

(3) Allowance for payments, where same are necessary and permanently beneficial.

(3) *Allowance for Permanent Improvements.*—Where a person is only part owner of an estate (or where he erroneously supposes himself to be the fee simple owner of it), and he (in entire good faith) permanently benefits the estate by repairs or improvements,—The rule is (1) Firstly, that as against the true owner who is ignorant of (and does not encourage him in) the expenditure, he has no title to be repaid the amount expended (*b*); But (2) Secondly, that if it become necessary for the true owner to proceed in equity, he will only be entitled to relief in equity upon the terms of his doing equity,—*i.e.*,

(*q*) *Cooper* v. *Phibbs*, L. R. 2 H. L. 149.
(*r*) 45 & 46 Vict. c. 38.
(*s*) *Bulteel* v. *Lawdeshayne*, 1906, 2 Ch. 11.
(*t*) *Hurrell* v. *Littlejohn*, 1904, 1 Ch. 609.
(*u*) *Middlemas* v. *Stevens*, 1901, 1 Ch. 574.
(*x*) *Bevan* v. *Habgood*, 1 J. & H. 222.
(*y*) *Biss* v. *Biss*, 1903, 2 Ch. 40.
(*z*) *Biss* v. *Biss*, *supra*.
(*a*) *Palmer* v. *Young*, 1 Vern. 276.
(*b*) *Nicholson* v. *Hooper*, 4 My. & Cr. 186.

by making compensation for the expenditure,—*Scil.*, so far as (and only so far as) the expenditure was necessary, and has proved permanently beneficial (*c*). A person who lays out money on the property of another with full knowledge of the state of the title (*d*),—or who lays out money unnecessarily or improperly, or otherwise *malâ fide* (*e*),—will, of course, have no such equity; but where a tenant for life under a will has gone on to finish improvements begun by the testator, equity says, that (in respect of his expenditure) he is entitled to a charge (*f*), or lien (*g*),—and directs an inquiry, for the purpose of ascertaining whether the outlay has been for the benefit of the inheritance (*h*),—*Scil.*, the *permanent* benefit of the estate, as distinguished from outlays on ordinary "*repairs*" (*i*).

Improvements by tenant for life,—

By reason of the Improvement of Land Act, 1864 (*k*), and other subsequent Acts *in pari materiâ* (such as, *e.g.*, the Agricultural Holdings Act, 1908 (*l*)), a tenant for life, instead of expending his own money in improvements, now expends money borrowed from some Land Loan Society for the purpose; and the Acts make the repayment of the moneys a charge upon the lands improved, repayable by yearly instalments by the successive tenants for the time being,—the instalments (which used to extend, in general, over twenty-five years only) now extending over any period (not exceeding forty years) which the Board of Agriculture and Fisheries may sanction (*m*). Also, by the Settled Land Act, 1882 (*n*), s. 21, capital money arising under the Act may (subject as therein expressed) be applied in payment of any improvement authorised by the Act; and the classes of improvements thereby authorised are those specified in s. 25 of the Act. But where such an application of the

Under Improvement of Land Act, 1864;

or under Settled Land Act, 1882.

(*c*) *In re Cook's Mortgage*, 1896, 1 Ch. 923.
(*d*) *Ramsden* v. *Dyson*, L. R. 1 H. L. 129.
(*e*) *Pole* v. *Pole*, 2 De G. & Sm. 420.
(*f*) *Dent* v. *Dent*, 30 Beav. 363.
(*g*) *In re Montagu*, 1897, 2 Ch. 8.
(*h*) *In re Leigh's Estate*, L. R. 6 Ch. App. 887.
(*i*) *In re Willis*, 1902, 1 Ch. 15.
(*k*) 27 & 28 Vict. c. 114, amended by 62 & 63 Vict. c. 46.
(*l*) 8 Edw. VII. c. 28.
(*m*) 62 & 63 Vict. c. 46.
(*n*) 45 & 46 Vict. c. 38.

money is intended to be made by a tenant for life, he ought, in general, to first submit a scheme for the execution of the improvements to the trustees of the settlement, or else to the Court (*o*); but while he acts with *bona fides*, he has a large discretion (*p*).

Trustee has a lien on trust fund for expenses of renewal.

A trustee or executor (or other fiduciary person), who renews a lease, has a lien upon the estate for the costs and expenses of the renewal with interest; and he may either pay himself such costs and expenses out of any free moneys in his hands, or he may raise the same by a mortgage of the trust estate (*q*),—the lien being confined, of course, to the trust estate (*r*). Also, generally, where payments have been made, in the nature of salvage, in order to prevent (*e.g.*) the lapse of a policy of life assurance, the person making such payments (not being a mere volunteer) is entitled to a lien on (*e.g.*) the proceeds of the policy for the amount of his payments (*s*),—but not so as to have priority (like in the case of a true salvage lien) over a mortgagee of the policy (*t*). Also, a charge given by the receiver in a debenture holder's action,—*Scil.*, for the maintenance of the debenture security,—is in the nature of a salvage charge, and is valid,—and (subject to the costs lawfully payable in priority) it takes precedence of the debentures (*u*); and any one who (as an officer of the Court) receives moneys which have been, in fact, earned through the exertions of another, must repay that other what in conscience is right (*x*).

Salvage payments generally,—lien for.

Salvage charges,—of receivers.

(4) Heir of mortgagee, trustee for personal representatives,—still so, as to copyholds.

(4) *Heir a Trustee for Next of Kin.*—When a mortgagee in fee, who has not foreclosed, dies intestate, the legal estate in the mortgaged premises used to descend to his heir, but as a trustee only for the personal representatives of the deceased mortgagee,—for the purpose of securing the due payment of the mortgage moneys to

(*o*) *Norfolk* v. *Herries*, 1900, 1 Ch. 461.
(*p*) *Lefroy* v. *Egmont*, 1906, 2 Ch. 151.
(*q*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 19.
(*r*) *In re Winchelsea's Policy Moneys*, 39 Ch. D. 168.
(*s*) *Leslie* v. *French*, 23 Ch. Div. 552; *Jennings* v. *Mather*, 1902, 1 K. B. 1.
(*t*) *Falcke* v. *Scottish Imperial Insurance*, 34 Ch. Div. 234.
(*u*) *Smith* v. *Lubbock*, 1901, 2 Ch 357.
(*x*) *In re Tyler, Ex parte O. R.*, 1907, 1 K. B. 865.

these latter, to be paid over by them to the next of kin (or other the persons entitled to the personal estate) of the deceased mortgagee (*y*). And that was so, even where the deceased intestate was in possession as mortgagee (*z*), —and even in adverse possession (*a*),—*Scil.*, where the possession of the deceased had not already (at the date of his death) fully matured into the absolute and irredeemable fee simple estate (*b*),—although, of course, if the possession of the deceased should have then already so matured, his heir would be and remain entitled beneficially himself (*c*).

And now, Firstly, under the Conveyancing Act, 1881 (*d*), s. 4, the executor or administrator of the deceased may himself reconvey the legal estate on payment of the mortgage money; and, by s. 30, that legal estate now descends (under that Act) into him, whether the deceased die testate or intestate,—but the old law still holds good as to the *legal* estate in mortgaged copyholds (*e*). And, Secondly, under the Land Transfer Act, 1897 (*f*), all real estate (other than the *legal* estate in copyhold hereditaments (*g*)) now vests (upon the death, whether testate or intestate, of the beneficial fee simple owner) in the legal personal representatives of such owner, exactly as if it were a chattel real (s. 1),—*Scil.*, as trustees for the persons who by law are beneficially entitled thereto (s. 2). And, exactly like executors may do as regards bequests of leaseholds, so these representatives may assent to any devise of the real estate (s. 3); or the devisee himself may enforce a conveyance thereof to him from them (ss. 2, 3) (*h*). But, *nota bene*, all the executors (as well the proving executors as also the executors who have not yet proved) are the persons in whom the real estate so vests (*i*). Also, it is the general execu-

(4a) Legal representatives (since 31st December, 1897),—now trustees for beneficial devisees.

(*y*) *Thornbrough* v. *Baker*, 1 Ch. Ca. 283, 1046.
(*z*) *Noy* v. *Ellis*, 2 Ch. Ca. 210.
(*a*) *Drayton* v. *Loveridge*, 1902, 2 Ch. 859.
(*b*) *Clarkson* v. *Bowyer*, 2 Vern. 61.
(*c*) *Pearce* v. *Marsh*, 1904, 1 Ch. 518.
(*d*) 44 & 45 Vict. c. 41, s. 30.
(*e*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 88.
(*f*) 60 & 61 Vict. c 65.
(*g*) *In re Somerville and Turner*, 1903, 2 Ch. 583.
(*h*) *In re Cary and Lott*, 1901, 2 Ch. 463.
(*i*) *In re Pawley and L. & P. Bank*, 1900, 1 Ch. 58.

tors (as distinguished from the special executors, if any) who are to give the assent or to execute the conveyance (*k*).

And here note, that by *legal* estate in copyholds it is intended to denote that the deceased (testate or intestate) was the "*tenant*" on the Court rolls at the date of his death; and if he was not then the admitted tenant,—but was merely an *unadmitted* surrenderee or devisee himself, or had the equitable estate only (or the incomplete legal estate only) in the copyholds,—then the Conveyancing Act, 1881, s. 30, equally with the Land Transfer Act, 1897, s. 1, would be fully applicable; and the copyholds of the mortgagee (or trustee) would in that case descend into the legal personal representatives of the deceased (*l*), *semble:*

(5) Surplus sale proceeds, —on a sale by mortgagee

(5) *Solicitor of Selling Mortgagee, receiving the Surplus Sale Proceeds.*—If a mortgagee, in the due exercise of his power of sale, sells the mortgaged hereditaments, and there is a "*surplus*" of the sale-proceeds, he becomes a trustee (although a constructive trustee only) of that surplus: and if the solicitor (who is acting for the selling mortgagee) receives (and retains) any part of the surplus sale-proceeds, he (the solicitor) thereby becomes also chargeable as a constructive trustee of the surplus sale-moneys so received and retained by him,—So that the legal personal representative of the mortgagor (in case of the mortgagor's death) would be entitled to recover these surplus sale-moneys from the solicitor,—or from his estate, if he should be since dead (*m*).

Equity's manner of *constructing* trusts, explained.

The constructive trusts above exemplified are constructed by a Court of Equity on the foundation of the *legal* estate, equity building up,—that is, *constructing*, —on that foundation, and in the due exercise of its judicial discretion (*n*), the trust for which it perceives an equity.

(*k*) *Cohen's Executors' case*, 1902, 1 Ch. 187.
(*l*) *In re Somerville and Turner, supra.*
(*m*) *Lake* v. *Bell*, 34 Ch. D. 462.
(*n*) *Cowper* v. *Cowper*, 2 P. Wms. 720, on pp. 753, 754.

CHAPTER VI.

TRUSTEES AND OTHERS STANDING IN A FIDUCIARY RELATION.

Who may be trustees; and who should, or should not, be trustees.

A TRUSTEE should be a person capable not only of *taking* but also of *holding* the legal estate, and should be of good natural capacity also. Therefore:—

Firstly, an infant is unsuitable as a trustee,—either of lands or of goods (*a*).

Secondly, A corporation (which, by the way, cannot be "*seised to a use at all*" (*b*)), is unsuitable as a trustee of lands (*c*),—although suitable enough as a trustee of goods. A corporation may also, now, be a co-trustee of goods (*d*), —and where it can hold land without any licence in mortmain, even of lands (*e*). And, *nota bene*, the public trustee, constituted under the provisions of the statute 6 Edw. VII. c. 55, is a corporation.

Thirdly, A married woman used to be unsuitable as a trustee (*f*),—*Scil.*, because of the legal unity of husband and wife (*g*); but an unmarried female, whether widow or spinster, was free from objection,—assuming always that she was a woman of practical common sense; and similarly, *now*, even a married woman, *semble* (*h*).

And, Fourthly, Any alien, although being and remaining an alien, is now as capable as a native-born subject, even as regards real estate (*i*),—differently from what used

(*a*) *Hearle* v. *Greenbank*, 3 Atk. 712.
(*b*) Challis, R. P., 2nd ed., pp. 354, 355.
(*c*) *Att.-Gen.* v. *St. John's Hospital*, 2 De G. J. & Sm. 621.
(*d*) 62 & 63 Vict. c. 20.
(*e*) *Thompson* v. *Alexander*, 1905, 1 Ch. 229.
(*f*) *Lake* v. *De Lambert*, 4 Ves. 595.
(*g*) *In re Harkness and Allsopp*, 1896, 2 Ch. 358.
(*h*) 7 Edw. VII. c. 18, s. 1.
(*i*) 33 & 34 Vict. c. 14, s. 3.

to be the case (*k*). But, *nota bene,* an alien (or anyone usually resident out of the jurisdiction) is not a desirable or convenient trustee.

Equity never wants a trustee.

Wherever a trust exists, and there is no trustee to execute it, equity decrees him a trustee in whom the legal estate is,—the want of a trustee not affecting the beneficial interest: Therefore, where property has been bequeathed in trust without the appointment of any express trustee,—If it is personal estate, the personal representative is deemed the trustee; and if it is real estate, the heir or devisee would have been,—and now, under the Land Transfer Act, 1897 (*l*), the legal personal representative will be,—the trustee. Also, where there is no executor (or the executor becomes incapable), the Court may appoint a trustee to discharge the duties of the executor (*being duties which the executor would as a trustee execute* (*m*)),—but, more usually, a legal personal representative will (in such a case) be constituted by the Probate Division (*n*). Also, under the provisions of the Judicial Trustees Act, 1896 (*o*), and the rules of August, 1897, made under that Act, the Court may, in its discretion (*p*), appoint the official solicitor of the Court (or some other person (*q*)), to be a judicial trustee,—and that either alone or jointly with any existing trustee, or executor or administrator.

Disclaimer by trustees,—effect of, when the trust is by deed.

Where real estate (or, in fact, any property whatever) is conveyed by deed to A.B., as a trustee upon specified trusts,—and A.B. disclaims the estate by express deed of disclaimer (his acceptance of the estate being, in the absence of an *express* disclaimer, assumed (*r*)),—In such a case, the real estate remains in (or results or reverts

(*k*) *Fish* v. *Klein*, 2 Mer. 431.
(*l*) 60 & 61 Vict. c. 65.
(*m*) *In re Moore*, 21 Ch. Div. 778.
(*n*) *Re Bradley*, 8 Prob. D. 215; *Re Pryse*, 1904, P. 301; *Re Edith Mary French*, 1910, P. 169.
(*o*) 59 & 60 Vict. c. 35.
(*p*) *In re Ratcliff*. 1898, 2 Ch. 352.
(*q*) *Douglas* v. *Bolam*, 1900, 2 Ch. 749.
(*r*) *London and County Bank* v. *River Plate Bank*, 21 Q. B. D. 535, on p. 541.

to) the settlor who conveyed it; and he (the settlor) holds it as a trustee and upon the specified trusts, exactly as A.B. would have done, if he had accepted the estate (*s*). And similarly, where the trust is created by will, and the devisee-trustee disclaims, the heir-at-law would, of course, take the devised estate,—and become the trustee thereof: And, *semble*, the disclaimer need not be (although it usually is) by deed,—but may be *in pais* (*t*).

In what sense the trustee is the *servant*,—and in what sense the *controller*,—of his *cestui que trust*.

A trustee must observe all the rules of equity, relative to trustees,—and he departs therefrom at his own particular peril. But (subject to that) the trustee is a servant to his *cestuis que trustent;* and any *cestui que trust* may assign his beneficial interest without the consent of the trustee (*u*); and a majority of the *cestuis que trustent* may (*x*),—and, in a proper case, a minority even may (*y*), —demand back the trust money from the trustee. And a *cestui que trust*, although entitled for a limited interest only (*e.g.*, as tenant for life only), may (under certain restrictions) insist upon being let into the possession of the trust property (*z*),—but he will not, as a general rule, be given the custody also of the title-deeds, there being a danger in that. Also, the *cestuis que trustent* (or any one or more of them) may compel the trustee to the execution of any particular duty; and if (*e.g.*) a *cestui que trust* has reason to suppose, that the trustee is about to do an act not authorised by the trust, he may have an injunction to restrain him (*a*).

Trustees,—discretions of,—when and how far controlled by the Court.

The Court exercises, as regards all trustees, a general controlling influence over them,—even in respect of their discretionary powers (*b*): For example, where the plaintiff sought to restrain the trustees of certain settled estates (of which he was the tenant for life) from raising a sum of £30,000 by sale or mortgage, and contended that they should raise the sum by timber-cuttings (the trustees

(*s*) *Mallott* v. *Wilson*, 1903. 2 Ch. 494.
(*t*) *Birchall* v. *Ashton*, 40 Ch. D. 436.
(*u*) *Donaldson* v. *Donaldson*, Kay, 711.
(*x*) *Wilson* v. *Church*, 13 Ch. Div. 1.
(*y*) *Collingham* v. *Sloper*, 1893, 2 Ch. 96.
(*z*) *West* v. *Wythes*, 1893, 2 Ch. 369.
(*a*) *Balls* v. *Strutt*, 1 Hare, 146.
(*b*) *Tempest* v. *Lord Camoys*, 21 Ch. D. 571.

having it in their discretion to raise the amount in either of these two ways),—The Court said, that the trustees must exercise their discretion in the way which should affect the successive limited owners in the least prejudicial way (*c*).

Release of trustee,—modes of, formerly and now,.

A trustee who has accepted the trust cannot afterwards renounce it; and an executor-trustee, by proving the will, is deemed to have accepted the trusts of the will (*d*): A trustee may, however, obtain a release from the trusteeship; and as regards that matter, the mode in which a trustee formerly obtained his *release* was either under an order of the Court,—*Scil.*, where there was no express power to release him in the instrument creating the trust; or else all the parties interested must have executed the release (*e*). But now, under the Trustee Act, 1893, s. 11 (repeating the like provision contained in the Conveyancing Act, 1881, s. 32), a trustee may by deed *retire* from the trust,—*provided two trustees remain*, and provided these two trustees *and* the person (if any) entitled to appoint new trustees express their consent to his retirement; and, under the Judicial Trustees Act, 1896, and Rule 23 of the rules made under that Act, a judicial trustee may *retire*, on giving notice to the Court of his desire in that behalf.

and in the case of judicial trustee.

Trustee cannot delegate his office,—

The office of trustee (being one of personal confidence) cannot, in general, be delegated,—trustees who take upon themselves the management of property for the benefit of others having no right to shift their duty in that particular on to other persons,—*Delegatus non potest delegare*.

Save by statute,—or where (incidentally) a necessity for it.

A limited power of delegation, however, has now been conferred on trustees (including executors and administrators), by the Trustee Act, 1893, s. 17,—repeating a similar provision contained in the Trustee Act, 1888, s. 2,—That is to say, a trustee may now depute his solicitor to receive the purchase-money of an estate sold; or may depute his solicitor (or any banker) to receive moneys payable under a policy of (life) assurance,—the

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(*c*) *Marker* v. *Kekewich*, 8 Ha. 291.
(*d*) *Mucklow* v. *Fuller*, Jac. 198.
(*e*) *Manson* v. *Baillie*, 2 Macq. H. L. Ca. 80.

trustee remaining liable, of course, to see to the security or safety of the purchase-moneys and of other the moneys so received,—and being bound also to show diligence in that (*f*),—*Scil.*, reasonable diligence (*g*). Also, trustees and executors may, of course, always justify their administration of the trust fund through the instrumentality of others, where there is either a moral or a legal necessity for so doing (*h*): Also, under exceptional circumstance, when portion of the trust money (*e.g.*) has been invested on the mortgage of a building estate, and (in the course of the development of that estate) frequent reference to the title-deeds is a necessity,—The trustee may legitimately leave such title-deeds with his solicitors (*i*),—although he ought, in the general case, to hold the title-deeds himself.

Securities and title-deeds,—custody of.

On the other hand, there can hardly be any reason justifying the trustee for leaving indefinitely with his solicitors,—although he may safely enough leave with his bankers (*k*),—convertible securities (such as bonds) which are payable to bearer; and in the case of judicial trustees, the title-deeds, and all certificates and other documents evidencing the title of the trustee to the trust property, must be deposited either with the bank at which the trust account is kept, or else with such other custodian as the Court may direct (*l*). But, *nota bene*, where there are two trustees, and one of them already has the custody of the title-deeds, the other may (in the general case) safely leave *him* in the custody and possession thereof,—not having, in fact, any legal right to alter that custody (*m*).

Care to be observed in any delegation by trustee,—

Generally, the rule is, that trustees are not liable for employing agents, when as prudent men of business they would do so if acting on their own behalf: But that rule is no protection to them, if they fail to exercise common prudence, either in their original selection of the agent,

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(*f*) *Wyman* v. *Patterson*, 1900, A. C. 276.
(*g*) *De Brimont* v. *Harvey*, 1911, 1 Ch. 50.
(*h*) *Mendes* v. *Guedalla*, 2 J. & H. 259.
(*i*) *Field* v. *Field*, 1894, 1 Ch. 425.
(*k*) *Lewis* v. *Nobbs*, 8 Ch. Div. 591.
(*l*) *Dent* v. *De Pothonier*, 1900, 2 Ch. 529.
(*m*) *Jones* v. *Trappes*, 1903, 1 Ch. 262.

For example, in respect of a valuation of a proposed mortgage security.

or in their subsequent supervision of his acts: For example, if they employ a solicitor to act as a valuer,—or if they accept their solicitor's recommendation of a valuer, *without satisfying themselves (by independent inquiry) that the suggested valuer is a proper agent in that behalf* (*n*); or if they do not supply the agent (being a valuer selected by themselves) with true and sufficient particulars of the property he is appointed to value (*o*),—or accept from him a vague general report, not showing the necessary details to enable them to judge for themselves (*p*),—all these precautions being such as prudent men of business would observe in lending their own moneys on mortgage,—they will, usually, be liable for the resultant loss:

Trustee Act, 1893,—provisions of, as to delegation of duties.

That is to say, unless the provisions of the Trustee Act, 1893, s. 8, may have altered the rules of equity in these respects: But these last-mentioned provisions amount in fact only to this, that the trustee shall not be liable (as for a breach of trust, in respect of an investment of the trust estate on an inadequate security), when "*the Court is satisfied,*" Firstly, that the trustee in making the loan "was acting upon a report, as to the value of the property, made by a person whom the trustee *reasonably* believed to be an able practical surveyor or valuer, instructed and employed independently of any owner of the property;" and, Secondly, that the amount of the loan does not exceed two equal third parts of "the value of the property *as stated* in such report;" and, Thirdly, that the loan was made "under the advice of such surveyor or valuer *expressed in such report,*"—The principle underlying these provisions being this, that if an independent valuer of reputation, sufficiently instructed to make a just valuation, will *state* (*i.e.*, represent) the value as sufficient, and will *expressly advise* the acceptance of the security,—*knowing the consequent liability which he (the valuer) will thereby personally incur if his representation and advice are erroneous,*—the trustee may safely be taken

(*n*) *In re Weall*, 42 Ch. Div. 674.
(*o*) *Re Partington*, 57 L. T. N. S. 654.
(*p*) *Whiteley* v. *Learoyd*, 12 App. Ca. 727.

to have done all that his duty in this particular requires (*q*).

The care and diligence required of trustees, as regards,—

If trustees take the same care of the trust property that a man of ordinary prudence would take of his own, they will not be liable for any *accidental* loss,—whether by a robbery of the property while in their own possession (*r*); or by a robbery of the property while in the possession of others *with whom it has (in the ordinary course of business) been entrusted* (*s*); or by a depreciation in the value of the securities upon which the trust funds have been rightfully invested (*t*). But, in fact, in determining the liability or non-liability of a trustee for any loss sustained by the trust estate, the Court distinguishes between, Firstly, the *duties* imposed upon him, and, Secondly, the *discretions* vested in him, as a trustee.

(a) Duties;

And, Firstly, as regards his *Duties*,—The utmost diligence in observing same (*i.e.*, *exacta diligentia*) is his only protection against liability for any loss; and no circumstance of mere hardship will excuse him (*u*). Therefore, if a trustee permits the trust fund to remain (*e.g.*) in the hands of a banker (not being, in the case of a judicial trustee, the banker of the trust) more than a year after the testator's death, and after the debts, &c. have been paid (*x*),—or mixes the trust property with his own, or (by associating with himself the authority of another person) parts with his exclusive control over the fund (*y*); or if the fund is left to the entire control of a co-trustee (*z*),—or be lent to such co-trustee (*a*),—In all these cases, it will be at the trustee's risk (*b*). And, *nota bene*, it is considered a breach of trust, to invest the trust funds on a contributory mortgage (*c*); and it used to be considered a breach of trust, to concur in a contributory

(*q*) *Somerset* v. *Earl Powlett*, 1894, 1 Ch. 231.
(*r*) *Morley* v. *Morley*, 2 Ch. Ca. 2.
(*s*) *Speight* v. *Gaunt*, 9 App. Ca. 1.
(*t*) *Cocks* v. *Chapman*, 1896, 2 Ch. 763.
(*u*) *Caffrey* v. *Danby*, 6 Ves. 488.
(*x*) *Darke* v. *Martyn*, 1 Beav. 525.
(*y*) *Lupton* v. *White*, 15 Ves. 432; *Webb* v. *Jonas*, 39 Ch. Div. 660.
(*z*) *Scotney* v. *Lomer*, 29 Ch. Div. 535.
(*a*) *Stickney* v. *Sewell*, 1 My. & Cr. 8.
(*b*) *Castle* v. *Warland*, 32 Beav. 660.
(*c*) *Webb* v. *Jonas*, *supra*.

sale of the trust real estate (*d*); but, where the trust has been created since the 31st December, 1881, a contributory *sale*, if duly conducted, is now lawful enough (*e*).

(b) Discretions.

Secondly, as regards his *Discretions*,—The trustee will be protected from liability, if he properly exercises his discretion,—in compromising, *e.g.*, with an insolvent tenant of a house or farm, in order to get the possession of the house or farm (*f*). Also, if the trustee chooses a duly qualified solicitor, against whom there is no breath of suspicion, the trustee will not be liable for a loss resulting from the dishonesty of the solicitor so employed (*g*),—provided the employment be limited to work proper for a solicitor to do; but the trustee would in such a case be liable, if he had not exercised his discretion justly in the choice of the solicitor, or if he had deputed to him work not proper for a solicitor as such to do (*h*).

If a trustee is authorised to invest the trust property in such stocks, shares and securities as he (the trustee) shall "*think fit*," that is an absolute discretion in appearance only, and will not justify a *dishonest* exercise of the discretion (*i*). Also, if a trustee (under the investment clause in a will or settlement) has the power (at his discretion) of investing in any one or more of certain specified funds, comprising good, bad and indifferent securities; and he (at the request of an importunate *cestui que trust*) invests,—or leaves invested,—the trust funds in notoriously doubtful securities (as being authorised), then he will be liable, if he would not have invested (or left invested) his own moneys in that class of investment (*k*),—but otherwise he will not be liable (*l*). And even as regards investments in authorised *real securities* (*m*),—including leaseholds (*n*),—the trustee must exercise a just discretion; and if he should invest the

(*d*) *Rede* v. *Oakes*, 4 De G. J. & S. 505.
(*e*) Trustee Act, 1893, s. 13.
(*f*) *Blue* v. *Marshall*, 3 P. Wms. 381.
(*g*) *Hunt* v. *Elmes*, 2 De G. F. & J. 578.
(*h*) *In re Weall*, 42 Ch. Div. 674.
(*i*) *Smith* v. *Thompson*, 1896, 1 Ch. 71.
(*k*) *Knox* v. *Mackinnon*, 13 App. Ca. 753.
(*l*) *Smethurst* v. *Hastings*, 30 Ch. Div. 490.
(*m*) *Whiteley* v. *Learoyd*, 12 App. Ca. 727.
(*n*) *Bulteel* v. *Lawdeshayne*, 1906, 2 Ch. 11.

trust funds in (*e.g.*) a freehold "*brickfield*," he will be liable for any resultant loss. Also, if he has express power to continue a loan (made, *e.g.*, to a partnership firm), it is not a matter of course for him to continue such loan (after a change in the members of the firm (*o*)).

Limit of value for trust investments.

Formerly, also, the amount to be lent on the security of freehold *houses* was not allowed to exceed one-half the value of such houses, and on the security of freehold *lands* two-thirds the value of such lands (*p*): But this rule has been (to some extent) modified by the Trustee Act, 1893, ss. 8, 9,—continuing the like provisions contained in the Trustee Act, 1888, ss. 4, 5,—Whereby the limit of two-thirds has been substituted as the proper limit of value in the case of all kinds of property (whether lands, or houses, or other property), proposed as a security for the investment of trust money. But still the trustee must properly exercise his discretion in such a case (*q*).

The Act provides also that when the amount invested exceeds the prescribed limit, the investment shall be deemed an authorised one up to the limit; and accordingly, the trustee will now be liable only for the excess (*r*), —the law having formerly been, that the trustee was liable for the entire amount, taking over the improper security to himself (*s*),—*Scil.*, unless where the *cestuis que trustent* chose to adopt the security (as they might have done (*t*)).

And a simple executor or administrator is a trustee within the meaning of these distinctions and provisions; and a judicial trustee is also within them.

Relief of trustee under Judicial Trustees Act, 1896; and of director under Companies Act, 1908.

Under the Judicial Trustees Act, 1896 (*u*), s. 3, the Court may, however, now relieve a trustee of all liability for a breach of trust (past, present, or future); but the Court will relieve the trustee, only where (and so far

(*o*) *Tucker* v. *Tucker*, 1894, 3 Ch. 429.
(*p*) *Olive* v. *Westerman*, 34 Ch. Div. 70.
(*q*) *Shaw* v. *Cates*, 1909, 1 Ch. 389.
(*r*) *In re Lake, Ex parte Howe Trustees*, 1903, 1 K. B. 439.
(*s*) *Head* v. *Gould*, 1898, 2 Ch. 250.
(*t*) *Marsh* v. *Keating*, 2 Cl. & F. 230.
(*u*) 59 & 60 Vict. c. 35.

as) it thinks that he has acted honestly *and* reasonably in the matter (*x*), and "*ought fairly to be excused*" (*y*), —but not in any other case (*z*): And an honest director also is now relievable in the like case (*a*).

Risky investments,—duty to call in, is limited.

It is also to be remembered always, that there is no positive rule of the Court, that executors or trustees must (*without exercising their own judgment in the matter*) call in their testator's mortgages (even risky ones) within twelve calendar months from the death: Nor is there any rule of the Court, that trustees retaining a security (authorised by their trust) are liable to make good a loss sustained through any fall in the value of the security, —the question in every case always being, Have the trustees acted honestly *and* prudently, and in the belief that they were doing what was best for all parties? (*b*)

But, *nota bene*, a trustee (and also an executor), who had permitted the bar of time to run against his right to recover some specific property or asset belonging to the trust estate, would meet with great difficulty in getting let off that neglect or tort,—although he might, in some exceptional case, be let off (*c*); and the like remarks apply, *semble*, to the after-acquired property of a wife, where there is a covenant to settle it (*d*).

No remuneration allowed to trustee.

Trustees or executors are entitled to no allowance for their care and trouble,—and are not permitted to profit by the trust, either directly or indirectly (*e*); and so strict is this rule, that although a trustee or executor may (by the direction of the author of the trust) have carried on a business at a great sacrifice of time, he will be allowed nothing as compensation for his personal trouble or loss

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(*x*) *Clews* v. *Grindey*, 1898, 2 Ch. 503.
(*y*) *Griessemann* v. *Carr*, 1911, 1 Ch. 300; *Palmer* v. *Emerson*, 1911, 1 Ch. 758.
(*z*) *Davis* v. *Hutchings*, 1907, 1 Ch. 356.
(*a*) 8 Edw. VII. c. 69, s. 279, repeating 7 Edw. VII. c. 50 s. 32.
(*b*) *Cocks* v. *Chapman*, 1896, 2 Ch. 763.
(*c*) *Youde* v. *Cloud*, L. R. 18 Eq. 634.
(*d*) *Ex parte Geaves*, 8 De G. M. & G. 291.
(*e*) *Vipont* v. *Radcliffe*, 1891, 2 Ch. 360.

of time (*f*),—*Scil.*, in the absence of some provision in the trust instrument entitling him to compensation (*g*).

Solicitor-trustee,—allowed only for costs out of pocket.

Also, a solicitor-trustee is not entitled to charge (except for his costs out of pocket only) for non-contentious business done by him in relation to the trust,—*Scil.*, unless there is in the deed or will a provision enabling him to receive remuneration for the transaction of such business (*h*); and as regards contentious business also, he is not entitled to the profit-costs of the action (*i*). But this rule of the Court (relative to solicitors), although a well-established rule, is not a convenient rule (or a beneficial rule) at all (*k*): Therefore, where the solicitor is only one of several co-plaintiffs or co-defendants in the action, he is allowed his full profit-costs in respect of his co-litigant (*l*); and even when the solicitor-trustee is the sole plaintiff (or sole defendant), his partner (if he act for him as his solicitor,—and will be *exclusively* entitled to the profit-costs for his own benefit) will be entitled to his full profit-costs (*m*).

Solicitor-mortgagee,—his costs, provision for.

Where the solicitor was a mortgagee, and (as such) was made a defendant to a redemption action; and he defended the action by himself or his firm,—He used to be entitled only to his costs out of pocket, and not to any profit-costs; but, now, under the Mortgagees' Legal Costs Act, 1895 (*n*), s. 3, he is entitled to his profit-costs in such a case,—and generally, in fact, to his full costs, whether the business be contentious or non-contentious, and including (in non-contentious business) his negotiation fee (*o*).

Express provision, in will,—as to costs.

Where a solicitor (executor or trustee) is by an express clause in the will to be "*at liberty to charge for professional services*," that is a sort of bequest (*p*) or annuity (*q*)

(*f*) *Longstaffe* v. *Fenwick*, 10 Ves. 405.
(*g*) *Bignell* v. *Chapman*, 1892, 1 Ch. 59.
(*h*) *Burgess* v. *Vinnicombe*, 34 Ch. Div. 77.
(*i*) *Imperial Mercantile* v. *Coleman*, L. R. 6 H. L. Cas. 189.
(*k*) *Chorley's case*, 13 Q. B. D. 872.
(*l*) *Cradock* v. *Piper*, 1 Mac. & G. 664.
(*m*) *Clack's case*, 7 Jur. N. S. 441.
(*n*) 58 & 59 Vict. c. 25.
(*o*) *In re Norris*, 1902, 1 Ch. 741.
(*p*) *Pennell* v. *Franklin*, 1898, 1 Ch. 297.
(*q*) *Att.-Gen.* v. *Eyres*, 1909, 1 K. B. 723.

to him; but, under such a clause, he can (in the general case) only charge for services strictly professional,—and not for matters which an executor or trustee ought to have done personally and without the intervention of a solicitor (*r*): Therefore, the will ought to give the solicitor a wider liberty in that respect, extending as well to professional business as also to business not strictly professional (*s*): And inasmuch as this liberty, where it is given, will be construed as meaning only costs and charges "*properly incurred*,"—Therefore, it is safe,—and also convenient,—that the liberty should extend to authorising the co-trustees to settle (without taxation) the amount of such charges (*t*), the co-trustees exercising in such latter case merely the discretion of ordinary business men. Occasionally, however,—(in bankruptcy (*e.g.*), and in the case of judicial trustees), the remuneration of a trustee may be fixed by statute, or by rule having the force of statute,—and in such a case, the prescribed amount and mode of the remuneration must be observed (*u*).

Trustees may stipulate to receive compensation.

There is, however, nothing to prevent trustees (not being solicitors) contracting with their *cestuis que trustent* to receive compensation for the performance of the duties of the trust; only such a contract will be regarded very jealously by the Court. The Court will also, on a proper application being made to it, sanction a commission being paid (or allowed) to the trustee for his trouble, where (*e.g.*) the execution of the trust is more than ordinarily burdensome (*x*),—and that whether the trustee is an ordinary trustee or is a judicial trustee; but whether the trustee is to be paid or not for his trouble, his liability is and remains, in general (*y*),—but not invariably (*z*), —the same:

Trustee must not make any advantage out of his trust.

If a trustee or executor buys up any debt or encumbrance to which the trust estate is liable, *for a less sum*

(*r*) *Ames* v. *Taylor*, 25 Ch. D. 72.
(*s*) *Clarkson* v. *Robinson*, 1900, 2 Ch. 722.
(*t*) *Bennett* v. *Bennett*, 1893, 2 Ch. 413; *In re Wellborne*, 1901, 1 Ch. 312.
(*u*) *Peed's case*, 24 Q. B. D. 68.
(*x*) *Re Freeman's Settlement Trust*, 37 Ch. Div. 148.
(*y*) *Jobson* v. *Palmer*, 1893, 1 Ch. 71.
(*z*) *National Trustees* v. *General Finance*, 1905, A. C. 373.

than is actually due thereon, he will not be allowed to take the profit to himself; but the creditors and legatees (or other the *cestuis que trustent*) shall have the profit of the purchase (*a*). Also, if a trustee or executor uses the fund committed to his care in buying and selling land, or in stock speculations,—or lays out the trust money in a commercial adventure of his own, or employs it in his business,—he will be liable for all the losses, and the *cestui que trust* will be entitled to all the gains (*b*). And a trustee will not be allowed to take the benefit to himself of any renewal of the leases which are subject to the trust; nor will he be permitted, as a general rule, to purchase the trust estate from his *cestui que trust:*

All which rules apply also to constructive trustees,—whether agents (*c*); solicitors (*d*), guardians (*e*), or partners (*f*); directors of companies (*g*), or promoters of companies (*h*); managing owners (*i*), committees of inspection in bankruptcy (*k*), auditors (*l*), or borough treasurers (*m*); and all these fiduciary persons must, therefore, refund all profits improperly made by them at the expense of the trust estate (*n*),—with interest thereon at 4 per cent. *per annum* (*o*),—besides being denied,—in general (*p*), but not invariably (*q*),—all remuneration for their trouble.

But the question, for whom the officials referred to, or

(*a*) *Pooley* v. *Quilter*, 2 De G. & J. 327.
(*b*) *Docker* v. *Somes*, 2 My. & K. 655.
(*c*) *Tate* v. *Williamson*, L. R. 2 Ch. App. 55.
(*d*) *Savery* v. *King*, 5 H. L. Ca. 627.
(*e*) *Powell* v. *Glover*, 3 P. W. 252, *n.*
(*f*) *Aas* v. *Benham*, 1891, 2 Ch. 244.
(*g*) *Great Luxembourg Railway Co.* v. *Magnay*, 25 Beav. 586.
(*h*) *Gluckstein* v. *Barnes*, 1900, A. C. 240.
(*i*) *Williamson* v. *Hine*, 1891, 1 Ch. 390.
(*k*) *Luddy's Trustee* v. *Peard*, 33 Ch. D. 500.
(*l*) *Leeds Estate Co.* v. *Shepherd*, 36 Ch. Div. 787.
(*m*) *A.-G.* v. *De Winton*, 1906, 2 Ch. 106.
(*n*) *Imperial Mercantile* v. *Coleman*, L. R. 6 H. L. 189.
(*o*) *Parker* v. *McKenna*, L. R. 10 Ch. App. 118, on pp. 124, 125.
(*p*) *Andrews* v. *Ramsay*, 1903, 2 K. B. 635.
(*q*) *Hippisley* v. *Knee*, 1905, 1 K. B. 1.

any of them, are trustees, is sometimes a difficult one to answer (*r*).

But, *nota bene*, directors are not under any paramount duty to preserve the *corpus* of the trust estate, being free to deal therewith as "commercial men" in the exercise of a just discretion,—and to do also everything that is reasonably *incident* to the position they are in, which results from any prior lawful act of theirs (*s*). Also, under a special contract with the company (*t*), and not otherwise (*u*),—directors are free to retain to themselves their secret profits,—*Scil.*, Because, in such a case, these profits are not secret.

Exceptional cases in which trustee's purchase from *cestui que trust* holds good.

Trustees, unless when they are trustees holding upon an express trust to sell (*x*), may, however, occasionally purchase from their *cestuis que trustent*,—That is to say, in the following cases:

(1) If the trustee will give more for the trust estate than any other purchaser,—In other words, if he will give a "fancy price" for it; or
(2) If the offer to sell proceeds from the *cestuis que trustent*, and the trustee pays the ordinary value in the market, keeping his *cestui que trust* "at arm's length"; or
(3) If the sale is by public auction, and the trustee has the leave of the Court to bid (*y*); or
(4) If the trustee is only a bare trustee; or has retired from the trust, for (say) twelve years (*z*). Also
(5) Where a purchase is one which might not have stood originally, it may (by lapse of time and subsequent events) have become impossible of rescission (*a*),—although the Statutes of Limitation

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(*r*) *Bath* v. *Standard Land Co.*, 1911, 1 Ch. 618.
(*s*) *Sheffield, &c. Building Society* v. *Aizlewood*, 44 Ch. Div. 112.
(*t*) *Costa Rica R. C.* v. *Forwood*, 1901, 1 Ch. 746.
(*u*) *Watkin's case*, 1904, 1 Ch. 242.
(*x*) *Delves* v. *Gray*, 1902, 2 Ch. 606.
(*y*) *Guest* v. *Smythe*, L. R. 5 Ch. App. 551.
(*z*) *Boles's case*, 1902, 1 Ch. 244.
(*a*) *In re Alexandra Palace Co.*, 21 Ch. Div. 149.

are, in general, no bar to such a suit (*b*), and the defence of laches or acquiescence is most difficult to establish (*c*). But where the purchase has been by an executor-trustee who has not proved the will (nor otherwise acted in the matter of the will or in the trusts thereof), if it is sought to invalidate the purchase, it must be shown that the purchaser used his peculiar position in such a way as to render it inequitable that the sale should stand (*d*).

Constructive, not liable to same extent as express, trustee.

As regards a *constructive* trustee, his liabilities are in general matters of quasi-contract only,—so that he is not bound by many of the rules which equity has annexed to the express fiduciary relation. Therefore, in *Knox* v. *Gye* (*e*), where it was contended that the surviving partner was a trustee of the share of his deceased partner, the Court said, that if the surviving partner was to be called a trustee at all for the dead man, the trust was *limited to the discharge of an obligation which was liable to be barred by lapse of time*. But where a person (not being an executor or an express trustee) has *employed the money of another in a trade or business* without any authority to do so, he must account, in general, for the profits,—having only some reasonable allowance (called a "*just allowance*") for his loss of time, and for his skill and trouble (*f*).

Time runs in favour of constructive trustee, although not in favour of express trustee.

Constructive trustee may have remuneration for time and skill.

An executor is not, as a general rule, an express trustee of the legacies given by the will,—although he may be or become an express trustee thereof (*g*); and when he is liable in respect of such legacies as an executor simply, he is only constructively a trustee thereof,—and accordingly, may, in general, plead the Statutes of Limitation in his defence (*h*). And when a woman gives her moneys to a

(*b*) *Burdick* v. *Garrick*, L. R. 5 Ch. App. 233.
(*c*) *Beningfield* v. *Baxter*, 12 App. Ca. 167.
(*d*) *Clark* v. *Clark*, 9 App. Ca. 733.
(*e*) L. R. 5 H. L. 656, 675.
(*f*) *Docker* v. *Somes*, 2 M. & K. 655.
(*g*) *Phillipo* v. *Munnings*, 2 My. & Cr. 309.
(*h*) *In re Davis*, 1891, 3 Ch. 119.

man to invest for her, and he invests them in his own name,—and the man is the woman's spouse, whether lawful (*i*) or unlawful (*k*),—he will be only constructively a trustee for her of the investments.

Trustee Act, 1888, s. 8,—When and when not the Statutes of Limitation are now a protection even to express trustees.

By the Trustee Act, 1888 (*l*), s. 8,—a statute applicable to trustees generally, but not to a trustee in a bankruptcy (*m*),—It has now been provided, generally, that [unless when the claim is founded on any fraud or fraudulent breach of trust to which the defendant-trustee was party or privy (*n*); or unless where the claim is to recover trust property or the proceeds thereof still retained by the defendant-trustee (*o*), or previously received by him and converted to his own use (*p*)],—In any action commenced after the 1st January, 1889, a defendant-trustee shall have the full benefit of all (if any) Statutes of Limitation which would be applicable if the defendant was not a trustee (*q*),—so that the old law in that particular (*r*) is now superseded. And, by the same Act and section, in any such action so commenced against a trustee (or even against a director (*s*)), where no Statute of Limitations is available as a defence to the claim,—The trustee (or the director) may, by force of the Act alone, plead the lapse of time in bar of the action, in like manner as in an action of debt for money had and received (*t*): But *as against the beneficiaries*, the statutes are to run only as from the time at which their interests (being reversionary) fall into possession (*u*),—so that the tenant for life may be barred, while the reversioner is not barred (*x*).

One trustee is liable for his co-trustee,—practically.

In *Townley* v. *Sherborne* (*y*), it was stated, that where lands are conveyed to two or more trustees, and one of

(*i*) *Mercier* v. *Mercier*, 1903, 2 Ch. 98.
(*k*) *James* v. *Holmes*, 4 De G. F. & J. 470.
(*l*) 51 & 52 Vict. c. 59.
(*m*) *In re Cornish*, 1895, 2 Q. B. 634.
(*n*) *Jones* v. *Morgan*, 1893, 1 Ch. 304; *Mason* v. *Mercer*, *ib.* 590.
(*o*) *Thorne* v. *Heard*, 1894, 1 Ch. 599.
(*p*) *Rickett* v. *Rickett*, 1906, 1 Ch. 793.
(*q*) *How* v. *Earl Winterton*, 1896, 2 Ch. 626.
(*r*) *Obee* v. *Bishop*, 1 De G. F. & J. 137.
(*s*) *In re Lands Allotment Co.*, 1894, 1 Ch. 646.
(*t*) *Andrew* v. *Cooper*, 45 Ch. D. 444.
(*u*) *Somerset* v. *Earl Powlett*, 1894, 1 Ch. 231.
(*x*) *Fountaine* v. *Amherst*, 1909, 2 Ch. 382.
(*y*) Cro. Car. 312.

them receives all (or the most part of) the profits, and after dieth or decayeth in his estate, his co-trustees shall not be compelled to answer for the receipts of him so dying or decayed,—"*Unless some evil-dealing appears to have been in them, to prejudice the trust;*" but that if there was "*any evil-practice or ill-intent,*" they should be charged; and the actual decision in the case was, that the trustee who had joined with his co-trustees in *signing receipts* was liable, though he had received nothing,—*Scil.*, because the liability of the non-receiving trustee arose, not from his mere signing of the receipts, but *from his subsequently leaving in the hands of his co-trustees the money that had been received,* which was an "*evil-dealing*": And in later times, the rule has been maintained, that a trustee who joins in a receipt for conformity, but without receiving, shall not (*by that circumstance alone*) be rendered liable for a misapplication by the trustee who receives (*z*),—So that a trustee may exonerate himself by showing, that the money acknowledged to have been received by all was in fact not received by all, and that he signed for conformity only. But, even so, the fact of his having joined in the receipt gives him notice, that trust money has been received,—So that he will not be justified thereafter in allowing the money to *remain* in the hands of the receiving co-trustee (*a*), for a longer period than the circumstances of the case may reasonably require.

"Signing for conformity," —effect of: (1) By itself alone.

(2) When coupled with subsequent neglect of duty.

Co-executors (as distinguished from co-trustees) are, in general, answerable each for his own acts only, and not for the acts of the other or others of them (*b*),—*Scil.*, because each executor has (independently of his co-executors) a full and absolute control over the personal assets of the testator, and is competent to give a valid discharge therefor by his own separate act,—In which respect, he is, apparently, different from one of several co-administrators (*c*): And an executor (and even an

One executor not liable for his co-executor,—practically.

(*z*) *In re Fryer*, 3 K. & J. 317.
(*a*) *Wyman* v. *Patterson*, 1900, A. C. 271.
(*b*) *Williams* v. *Nixon*, 2 Beav. 472.
(*c*) *Hudson* v. *Hudson*, 1 Atk. 460.

administrator) can of himself effectively compromise any claim (*d*),—even a claim by his co-executor (*e*); but, *nota bene,* not a claim by himself (*f*).

If, therefore, an executor join with his co-executor in signing a receipt, he does an *unnecessary* act (*g*),—and will be *primâ facie* answerable for any misapplication of the fund,—Unless he is able to show, that he never was, in fact, in a position (subsequently to signing the receipt) to control the receiving executor (*h*): That is to say,—if the receipt be given for mere form, then the signing will not charge the non-receiving executor; *but if the receipt be given under circumstances purporting that the money, though not actually received by both executors, was* UNDER THE CONTROL OF BOTH, then it will be different (*i*).

But executors would be liable as for wilful default,—even for what they have not received, where (but for their neglect) they might have received.

It is highly necessary also to remember, that the non-liability of an executor in respect of moneys received by his co-executor, holds good only in the absence of WILFUL DEFAULT on the part of the non-receiving executor,—For, if wilful default on his part be shown, having regard to his powers and duties under the will (*k*), he will be liable even for what he has not himself received: Therefore, in *Styles* v. *Guy* (*l*), where two of three executors knew perfectly well, that there were unsettled accounts between the testator and their co-executor,—and had reason to believe that the balance would be considerably against the co-executor; and they took no effectual steps, for several years after the testator's death, to compel their co-executor to account for (or to pay or secure) the balance due; and that co-executor went bankrupt; *and the other two were unable to show, that an attempt to recover the money at an earlier period would have been fruitless,*—The Court held, that these two others were liable to make

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(*d*) Trustee Act, 1893, s. 21.
(*e*) *Hawley* v. *Blake*, 1904, 1 Ch. 622.
(*f*) *Cooke* v. *Collingridge*, 1 Jac. 607.
(*g*) *Clough* v. *Bond*, 3 My. & Cr. 490.
(*h*) *Westley* v. *Clarke*, 1 Eden, 357.
(*i*) *Joy* v. *Campbell*, 1 Sch. & Lef. 341.
(*k*) *Rowley* v. *Adams*, 2 H. L. Ca. 725.
(*l*) 1 Mac. & Gord. 422.

good the loss (as having been occasioned by their wilful default): The decision in *Styles* v. *Guy* supposes, however, that there were either unpaid creditors or unpaid legatees of the testator who could not get paid their debts and legacies respectively, without the aid of the moneys owing from the debtor-executor,—Because when a testator appoints his debtor his executor, there is (at law) a merger of the debt (*m*); and once all the debts and the legacies are paid,—and the estate of the deceased testator is "*clear*,"—the legal merger is effective in equity also, in favour of the debtor-executor (*n*). And here note a curious thing which happened, in *Ingle* v. *Richards* (*o*), to a debtor-executor,—the Court there holding (in favour of the unpaid creditors and unpaid legatees of a deceased testator), that the debt which the executor owed to the estate, and which had become statute-barred four years after the death, was to be deemed to have been received by the debtor-executor, by force merely of that executor taking probate of the will (which he did) fifteen years after the death.

Recoupment or contribution,—as between co-trustees on a breach of trust,—

Where trustees are held liable for a breach of trust, the judgment is against both or all of them jointly; but (like other joint judgments), it may be executed against any one of the trustees singly; and when the judgment against two co-trustees is satisfied in part by one of them, and thereafter the other trustee goes bankrupt, the proof in his bankruptcy is for the whole original judgment debt (and not merely for the balance of it which remains unsatisfied (*p*)).

(1) As regards the trust-funds made good;

The Court will, occasionally (but only in exceptional cases), provide in the judgment against the trustees (when the one alone is morally guilty, and the other is only technically liable), that the innocent trustee shall be entitled to be recouped out of the estate of the guilty trustee the amount paid to the plaintiff in satisfaction of the breach of trust (*q*). But, when both trustees are

(*m*) *Wankford* v. *Wankford*, 1 Salk. 299.
(*n*) *In re Price*, *Price* v. *Price*, 11 Ch. D. 163.
(*o*) 28 Beav. 366.
(*p*) *Edwards* v. *Hood-Barrs*, 1905, 1 Ch. 20.
(*q*) *Bahin* v. *Hughes*, 31 Ch. Div. 390.

equally guilty, the Court will not so provide,—the right of the trustee who has made good the breach being a right to contribution, and not to recoupment (*r*); and, usually, the trustee WHO IS ENTITLED TO CONTRIBUTION must commence an independent action against his co-trustee, to enforce the contribution (*s*). Where the breach of trust consists of an unauthorised investment, the right is for contribution only (*t*); but where two trustees were equally involved in a breach of trust, and one of them was also a beneficiary, and the judgment against both was satisfied out of the beneficial interest of the one, the beneficiary trustee was held to have no right to contribution against his co-trustee (*u*). Also, where a trustee-beneficiary died, and (after his death) he was found to have overpaid the other beneficiaries and to have underpaid himself, his estate was held not to be entitled (as against the other beneficiaries) to be recouped that underpayment (*x*).

(2) As regards the costs of suit.

But, as regards the *costs* of the action for the breach of trust, neither recoupment nor contribution is, *semble*, available (by *action*) in favour of the trustee (whether guilty or innocent) who has paid the whole of such costs (*y*); but, occasionally, the Court will (in a proper case) make the necessary order *in the action itself* (*z*).

The right of a trustee, whether to recoupment or to contribution, is like the right of a surety; and the Statutes of Limitation, therefore, do not begin to run against such right, *until judgment for the breach of trust has been obtained* (*a*); and any merely *quia timet* action by the trustee (*Scil.*, any action before such judgment) would, apparently, be dismissed (*b*).

Indemnity and reimbursement

An express clause is usually inserted in trust instruments, that one trustee shall not be answerable for the

(*r*) *Priestman* v. *Tindall*, 24 Beav. 244; *Bahin* v. *Hughes*, *supra*.
(*s*) *Lingard* v. *Burnley*, 1 V. & B. 114.
(*t*) *Jackson* v. *Dickinson*, 1903, 1 Ch. 947.
(*u*) *Chillingworth* v. *Chambers*, 1896, 1 Ch. 685.
(*x*) *Wilson* v. *Cox-Sinclair*, 1905, 1 Ch. 76.
(*y*) *Dearsley* v. *Middleweek*, 18 Ch. Div. 236.
(*z*) *Cattley* v. *West*, 1904, 2 Ch. 785.
(*a*) *Robinson* v. *Harkin*, 1896, 2 Ch. 415.
(*b*) *Butler* v. *Butler*, 7 Ch. D. 116.

acts or defaults of his co-trustees,—but for his own acts and defaults only; and also a further express clause that the trustees may reimburse themselves out of the trust estate their costs, charges, and expenses properly incurred. But, as equity infuses such provisions into every trust deed (*c*), a person can have no better right from the expression of that which (if not expressed) would be implied (*d*); and the Trustee Act, 1893, s. 24 (continuing the like provision contained in Lord St. Leonards' Act, s. 31) has adopted this principle of equity,—That is to say, trustees are not to be thereby further indemnified (or reimbursed) than they were before; and a wider indemnity (or reimbursement) clause is therefore often expedient,—and is not unusually inserted in trust instruments (whether deeds or wills). The reimbursement is, in general, out of residue,—but may be out of any part of the estate (*e*),—and even out of income (*f*),—the trustee's right being paramount to the rights of all the *cestuis que trustent;* but there is no rule of law, requiring that the reimbursement (or the indemnity) shall be at the cost of the tenant for life *exclusively* (*g*); nor may the right of indemnity, in general, be so exercised as to defeat (or exhaust) the trust altogether (*h*). Apparently, the liability of the *cestui que trust* to indemnify his trustee, continues even after the *cestui que trust* has sold and assigned his whole beneficial estate and interest (*i*), —although, in such a case, the purchaser may be also liable, and primarily liable.

clauses,—utility of, in general.

As regards reimbursing or recouping trustees their costs of litigation,—and whether the trustees are the plaintiffs or are the defendants,—

Costs of litigation,—by or against trustees,—right of trustees to reimbursement.

Firstly, If they have obtained the leave of the Court to sue or (as the case may be) to defend,—which leave they will obtain, if the litigation appears to be *primâ*

(*c*) *Dawson* v. *Clarke*, 18 Ves. 254.
(*d*) *Worrall* v. *Harford*, 8 Ves. 8.
(*e*) *Stott* v. *Milne*, 25 Ch. Div. 710.
(*f*) *Sawyer* v. *Sawyer*, 28 Ch. Div. 595.
(*g*) *In re Lever*, 1897, 1 Ch. 32.
(*h*) *Darke* v. *Williamson*, 25 Beav. 622.
(*i*) *Matthews* v. *Ruggles-Brise*, 1911, 1 Ch. 194.

facie proper and in the interest of the estate,—They are protected thereby against their own *cestuis que trustent*, however the litigation may result,—and will therefore (in such a case) be entitled to be reimbursed their costs out of the trust estate;

But, Secondly, If they have omitted the precaution of obtaining such leave,—The rule is, that they are entitled (in that case also) to be reimbursed (out of the trust estate) their expenditure in costs (including even the extra costs incurred by the trustees in their own personal defence against a charge of personal fraud alleged against them),—*Scil.*, where the charge is in respect of something incidental to their administration of the trust estate (*k*),—but not in any case, if the litigation is speculative and (in the ultimate result) unsuccessful (*l*).

Generally, as regards the powers, duties, and responsibilities of trustees,—It is to be observed, Firstly, that upon the death of one of the trustees, the entire rights and powers survive over into the survivor or survivors,—So that the trustees or trustee "*for the time being*" may, in general, exercise all these rights and powers,—and (as regards powers) even powers which are discretionary (*m*); and the entire future responsibilities also so survive over, —without prejudice, nevertheless, to any responsibility which has accrued before the death, and which is (or may be) of a character to entitle the *cestuis que trustent* (or any of them) to proceed against the estate of the deceasing trustee: And it is to be observed, Secondly, that the primary duty of a trustee is to carry out the directions of the person creating the trust,—and (subject to that) to place the trust property in a state of security:

Duty of trustee to secure the trust property.

(1) Reduction into possession or quasi-possession.

If, therefore, the trust fund be an *equitable* interest, of which the legal estate cannot for the moment be got in, it is the trustee's duty to lose no time in giving notice to

(*k*) *Walters* v. *Woodbridge*, 7 Ch. D. 504; *Brinklow* v. *Singleton*, 1904, 1 Ch. 648.
(*l*) *In re Yorke*, *Barlow* v. *Yorke*, 1911, 1 Ch. 370.
(*m*) *Eastwick* v. *Smith*, 1904, 1 Ch. 139.

the person in whom the legal interest is vested; and if the trust fund be a *chose in action* which may be reduced into possession, it is the trustee's duty to get it in, and any unnecessary delay in that will be at his own risk. And, further, an executor is not to allow the assets of the testator to remain outstanding upon *personal* security, though the debt was a loan by the testator himself on what he deemed an eligible investment; and a trustee is not justified in himself lending on personal security,—although he may continue such loans (and also make new loans on personal security), if expressly empowered to do so by the instrument creating the trust (*n*),—exercising his discretion (in such case) in an honest and reasonable way (*o*),—and even loaning to one of the beneficiaries themselves, if he deems it prudent to do so (*p*).

(2) Realisation of moneys outstanding on personal security.

As regards the Range of Investments for trust funds, "The Trustee Act, 1893" (56 & 57 Vict. c. 53), repealing but re-enacting "The Trustee Investment Act, 1889" (52 & 53 Vict. c. 32), now authorises (by s. 1) trustees to invest trust funds in or upon (among the other securities to be presently mentioned) any of the securities in or upon which "cash under the control of the Court" may be invested (*q*); and the Act applies to all trusts, whether created before or after the 22nd September, 1893.

(3) The investment of trust funds.

Prior to the Trust Investment Act, 1889, and independently of any power given by statute, trustees exe-

(a) Investments authorised before Trust Investment Act, 1889.

(*n*) *Paddon* v. *Richardson*, 7 De G. M. & G. 56.
(*o*) *Smith* v. *Thompson*, 1896, 1 Ch. 71.
(*p*) *Laing* v. *Radcliffe*, 1899, 1 Ch. 593.
(*q*) By Ord. XXII. r. 17, cash under the control of (or subject to the order of) the Court, may be invested in (among others) the following stocks, funds or securities, viz.: 2½ per cent. Consols; stock under the Local Loans Act, 1887; Bank Stock; London County Council 3½ per cent. stock; India 3½ per cent. stock; India 3 per cent. stock; Indian guaranteed railway stocks or shares, not being redeemable within fifteen years from the date of investment; stocks of Colonial Governments guaranteed by the Imperial Government; mortgages of freehold and copyhold estates respectively in England and Wales; debenture, preference, guaranteed, or rent-charge stocks of railways in Great Britain or Ireland, having (for ten years next before the date of investment) paid a dividend on their ordinary stock or shares,—*Scil.*, being guaranteed by the railway company; and nominal debentures, or nominal debenture stock, under the Local Loans Act, 1875, not being redeemable within fifteen years from the date of investment.

cutors or administrators might lawfully have invested in Government securities, or in Consolidated Bank annuities (*r*); and trustees were enabled (by successive statutes) to invest in divers other investments and securities,—That is to say, by Lord St. Leonards' Act (22 & 23 Vict. c. 35), s. 32 (*s*), by Lord Cranworth's Act (23 & 24 Vict. c. 145), s. 25, and by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21. And now, under the express provisions of the Trustee Act, 1893 (which is in large measure a consolidating Act, and which has been extended, *quoad* investments, by the Colonial Stock Act, 1900 (*t*)),—Trustees, unless expressly forbidden by the instrument (if any) creating the trust,—or unless (*semble*) their investments are controlled by some special Act (as the investments of building societies are (*u*)),—may (if they have power to invest at all (*x*)), invest the trust funds in any of the following investments (besides those already specified for "cash under the control of the Court"),—That is to say: Parliamentary stocks or public funds, or Government securities of the United Kingdom; real securities in Great Britain or Ireland; stock of the Bank of England or of the Bank of Ireland; India three and a half per cent. stock, and India three per cent. stock, or any future issues of such stock; securities the interest of which is guaranteed by Parliament; certain listed Colonial Stocks: London County Council stock; debenture stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament (and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock); debenture stock of any railway company in India the interest on which is paid or guaranteed by the Secretary of State in Council of India (*y*); debenture or guaranteed or preference stock of any company in Great Britain

(b) Investments under Trustee Act, 1893.

(*r*) *Baud* v. *Fardell*, 7 De G. M. & G. 628.
(*s*) *In re Wedderburn's Trusts*, 9 Ch. Div. 112.
(*t*) 63 & 64 Vict. c. 62.
(*u*) *In re National Permanent Society*, 43 Ch. Div. 431.
(*x*) *In re Manchester Royal Infirmary*, 43 Ch. Div. 420.
(*y*) *Topham* v. *Armitage*, 1906, 2 Ch. 399.

or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter (and having during each of the ten years last past before the date of investment paid a dividend of not less than five pounds per annum on its ordinary stock); and nominal or inscribed stock lawfully issued by any municipal borough, having (according to the returns of the last census prior to the date of investment) a population exceeding fifty thousand,—or lawfully issued by any County Council, or lawfully issued by any Commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having (according to the returns of the last census prior to the date of investment) a population exceeding fifty thousand,—besides certain other stocks and debentures. And as regards any investments of the kind specified in the Act,—and whether made under the Act or before the Act,—the trustees may "*vary*" the same for other like investments (*z*),—and also (by the Trustee Act, 1894 (*a*), s. 4) may "*continue*" any of these authorised investments, notwithstanding that (since the investment of the trust funds therein) they may have ceased to be an authorised investment (*b*). But the trust instrument itself usually contains an express power to "*vary*" investments, and to "*retain*" or "*continue*" existing investments (*c*),—or existing *securities* (*d*).

"Real securities,"—meaning of this phrase.

A power to invest in "*real securities*" does not, of course, authorise the trustees to invest in the "*purchase*" of lands,—*Scil.*, because that is an alienation out and out of the trust property; and for such an alienation an express power is required. And any "*purchase*," which may have been lawfully made under an express power, is regarded as an "*investment*,"—so as to be realisable again by a sale thereof (*e*),—the sale being a sort of "*variation*" of the investment, and the rule being

(*z*) *Lopes* v. *Hume-Dick*, 1892, A. C. 112.
(*a*) 57 & 58 Vict. c. 10.
(*b*) *Cocks* v. *Chapman*, 1896, 2 Ch. 763.
(*c*) *Smith* v. *Lewis*, 1902, 2 Ch. 667.
(*d*) *Rayner* v. *Rayner*, 1904, 1 Ch. 176.
(*e*) *In re Gent and Eason*, 1905, 1 Ch. 386.

applicable also to the realisation of any real estate (originally mortgaged to the trustees) which they have (by foreclosure) acquired the absolute title to (*f*).

"*Real Securities*" mean and intend *first* mortgages only; but (subject to that) they extend to comprise leaseholds for long terms of years at a peppercorn rent, and which are not subject to onerous covenants,—but not any other leaseholds or terms of years (*g*),—the leaseholds prescribed by the Trustee Act, 1893, s. 5, being leaseholds having not less than two hundred years unexpired, and which are not subject to any rent greater than a shilling a year. "Real Securities" were supposed, until recently, to comprise also local rates, harbour duties, tolls, and the like, *levied* DIRECTLY *by local or other public authorities* (*h*); and this opinion, although afterwards doubted (*i*), has been now in great measure accepted again (*k*); and the Trustee Act, 1893, s. 5, now expressly authorises (as investments) improvement charges under the Improvement of Land Act, 1864 (or mortgages of such charges).

Breaches of trust,—may, in cases of emergency, be authorised by the Court.

An investment which is not authorised, either by the Acts above referred to or by the express investment clause or clauses contained in the trust instrument, cannot, in the general case, be sanctioned by the Court even (*l*),—although, in cases of "*emergency*," the Court may (under proper safeguards) sanction such an investment (*m*). And, similarly, when a power of sale is exerciseable by the trustees of a will *on the death of the tenant for life*, the power may not be exercised by them in the lifetime of such tenant,—not even with his consent; and the Court may not (nor will) sanction the accelerated exercise of the power (*n*),—unless in case of some grave emergency.

(*f*) *Chapman* v. *Browne*, 1904, 1 Ch. 785.
(*g*) *In re Chennell*, 8 Ch. Div. 492.
(*h*) *Finch* v. *Squire*, 10 Ves. 41.
(*i*) *Martin* v. *Lacon*, 33 Ch. Div. 332.
(*k*) *In re Crossley*, 1897, 1 Ch. 928.
(*l*) *In re New*, 1901, 2 Ch. 534.
(*m*) *In re Tollemache*, 1903, 1 Ch. 457, 955.
(*n*) *Blacklow* v. *Laws*, 2 Ha. 40, on p. 46.

(4) Conversion of terminable and reversionary property, —where comprised in residuary devise or bequest.

Where a testator subjects the *residue* of his personal estate to a series of limitations, such part of the residue as may be wearing out (such as leaseholds) must, in general, be converted,—and put in some permanent state of investment; and if the residue comprises property of a reversionary nature, that also must, in general, be converted,—and made at once income-producing (*o*). And the like rule is applicable also to unauthorised investments generally,—even although they should not be of a wearing out character (*p*). But this duty to convert does not arise when the trust instrument is a deed (*q*),—nor, of course, where the bequest is not residuary at all, but is specific (*r*). And it is to be here observed, that a residuary bequest may specifically enumerate divers properties, and yet continue (and usually it will continue) residuary, even as regards the specifically mentioned properties (*s*),—although it may, occasionally, be in fact specific (and not residuary), as regards the specifically mentioned properties (*t*).

Enjoyment *in specie*,— excludes the duty to convert.

The duty to convert may be excluded (1) by any express direction of the testator to the contrary; or even (2) by the sufficient indication of any intention on his part to exclude it. For example, the duty to convert does not arise where there is a discretionary power in the trustees to convert *when and as they shall deem expedient* (*u*),— or where the testator expressly authorises the retention of unauthorised investments (*x*),—thereby making them (for the time being) authorised investments (*y*). The duty to convert will also be excluded, if the testator expressly gives the income of the residue to be enjoyed *in specie* (*z*); and an enjoyment *in specie* may be even *impliedly* directed,—*e.g.*, from an enumeration of particulars (not being a mere expansion of what is comprised in

(*o*) *Howe* v. *Lord Dartmouth*, 7 Ves. 137.
(*p*) *In re Nicholson*, 1909, 2 Ch. 111.
(*q*) *Boustead* v. *Cooper*, 1901, 2 Ch. 779.
(*r*) *Moore* v. *Wilson*, 1907, 1 Ch. 394.
(*s*) *Baldock* v. *Green*, 40 Ch. D. 610.
(*t*) *Castle* v. *Gillett*, L. R. 16 Eq. 530.
(*u*) *Brandreth* v. *Colvin*, 1896, 2 Ch. 199.
(*x*) *Brown* v. *Gellatly*, L. R. 2 Ch. App. 751.
(*y*) *Hodgson* v. *Bates*, 1907, 1 Ch. 22.
(*z*) *Moore* v. *Wilson*, 1907, 1 Ch. 394.

the word *residue* (*a*)). But the right to enjoy *in specie* will not be readily implied (*b*); and even where an enjoyment *in specie* is directed, all such parts of the residue as consist of "*debts*" owing to the estate (*c*), or of "*shares in a partnership business*" (*d*), must be converted. An enjoyment *in specie* may arise also by force merely of the local law (*e*).

Time for conversion.

Where the duty to convert exists, it is a duty which must, in general, be fulfilled within a year from the testator's death (*f*); and where the trustees have a discretion as to the time for converting (*e.g.*, a reversionary interest in Consols), something (on the footing of income) must in the interim be paid,—in the general case (*g*), but not invariably (*h*),—to the tenant for life.

If there is a trust to convert, but with a discretionary power in the trustees to retain,—and the trustees disagree as to retaining, the trust to convert is paramount, and becomes absolute (*i*).

(5) Distinguishing between capital and income.

Where the *residue* is given on a series of limitations, and the duty of immediate conversion is excluded, the testator may either give the whole actual income of the existing securities until conversion to the tenant for life (*k*), or he may not do so: And where he has done so, no question arises,—at least, in the general case (*l*); but where he has not done so, then it appears, in questions between the tenant for life and the remainderman,—(1) That the tenant for life is entitled to the actual income of so much of the residue as is at the testator's death invested on authorised securities; and (2) That,

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(*a*) *Re Tootal's Estate*, 2 Ch. Div. 628.
(*b*) *Game* v. *Young*, 1897, 1 Ch. 881.
(*c*) *Holgate* v. *Jennings*, 24 Beav. 623.
(*d*) *Kirkman* v. *Booth*, 11 Beav. 279.
(*e*) *In re Moses*, 1908, 2 Ch. 235.
(*f*) *Grayburn* v. *Clarkson*, L. R. 3 Ch. App. 605.
(*g*) *Rowlls* v. *Bebb*, 1900, 2 Ch. 107.
(*h*) *Yates* v. *Yates*, 28 Beav. 637 (a case of building land lying idle).
(*i*) *In re Hilton, Gibbes* v. *Hale-Hinton*, 1909, 2 Ch. 548.
(*k*) *Chancellor* v. *Brown*, 26 Ch. Div. 42.
(*l*) *Askew* v. *Woodhead*, 14 Ch. D. 27.

with regard to the unauthorised securities (whether wasting or not (*m*)), he is entitled to only some apportioned part of that income,—being either (1) the income which would be produced by the authorised investments of these moneys if made at the end of one year from the testator's death,—or else (2) the interest on the then value, computed at the rate of 3 (and not 4) per cent. per annum (*n*). And where there are outstanding inconvertible securities, and they eventually fall in (*o*),—or where there is a bond-debt which is not realised until a great many years after the death (*p*),—the apportionment between capital and income is made, by ascertaining the sum which (put out at interest at three per cent. per annum on the day of the testator's death) would, with the accumulations of that interest at three per cent., and with yearly rests, have produced (on the day of the securities falling in) the amount actually received, and by treating the sum so ascertained as capital, and the rest as income; and where (in such a case) the full amount is not realised, the loss or deficiency must be similarly apportioned (*q*).

Mortgages by trustees and executors,—

Trustees, if they are to mortgage the trust estate, must have express power to do so: Which express power carries with it, in general, a power to insert in the mortgage deed a power of sale (*r*). But, this latter point having been doubted, it is better, in giving trustees a power to mortgage, to say that they may mortgage with or without a power of sale to be inserted in the mortgage deed (*s*).

(a) Personal assets.

As regards executors, on the other hand, they may, of course, sell or pledge whatever portion of the assets vests in them *virtute officii*,—and it will be intended (in the absence of fraud), that the sale or pledge is for the purpose of paying the testator's debts (*t*), and it seems to follow, that the executor may also mortgage, in

(*m*) *In re Woods*, 1904, 1 Ch. 4; *Chayter* v. *Horn*, 1905, 1 Ch. 233.
(*n*) *Kirkman* v. *Booth*, *supra*; *In re Woods*, *supra*.
(*o*) *In re Chesterfield's Trusts*, 24 Ch. Div. 643.
(*p*) *Turner* v. *Newport*, 2 Phill. 14.
(*q*) *In re Atkinson*, 1904, 2 Ch. 160.
(*r*) *Re Chawner's Will*, L. R. 8 Eq. 569.
(*s*) *Selby* v. *Cooling*, 23 Beav. 418.
(*t*) *Solomon* v. *Attenborough*, 1911, 2 Ch. 159.

Immediate sale, trust for, —excludes the right to mortgage.

general, such assets, with or without a power of sale in the mortgage deed (*u*). But as regards the assets which did not vest in the executor *virtute officii*,—*i.e.*, real estate devised to the executor,—It appears, that the executor might, occasionally,—but only occasionally,—have created a valid mortgage of that (*x*); but when the will contained a trust for sale, *and there was no power to postpone the sale*, the executor might not have made any such *interim* mortgage (*y*). However, now, and as regards all testators and intestates dying after the 1st January, 1898, the whole real estate of the deceased (other than the *legal* estate in his copyholds) vests (with the personal estate) in the executor or administrator as the legal representative,—and in a manner *virtute officii*, —by virtue of the express provision in that behalf contained in the Land Transfer Act, 1897 (*z*), s. 1,—the real estate being for this purpose regarded simply as a leasehold or chattel real: So that, by virtue of that Act, the legal representative may now, in his discretion, either sell or mortgage such real estate for any lawful purpose of the administration,—during (at least) the first year after the death and before any assent to the beneficial devolution of the estate (*a*).

(b) Real assets.

Executors,—carrying on the business of their testator.

Executors have not any authority (merely *virtute officii*) to carry on the business of their testator, and to use his estate therein,—although the will may, either expressly (*b*) or impliedly (*c*), empower them to do so: And, firstly, it is to be observed, that if the business is, in fact, carried on (whether under a power in the will to do so, or without any power in the will to do so),—the executors become (in either case) *personally* liable to the creditors, on the contracts which they (the executors) make with them,—So that the creditors may (in all cases) sue the executors on these contracts, and get *personal* judgment against them for the debts (*d*): And where,

(1) Where no power in the will to do so.

(*u*) *M'Leod* v. *Drummond*, 17 Ves. 154.
(*x*) *Corser* v. *Cartwright*, L. R. 7 H. L. 731.
(*y*) *Haldenby* v. *Spofforth*, 1 Beav. 390.
(*z*) 60 & 61 Vict. c. 65.
(*a*) *Ibid.* s. 2, sub-s. 2.
(*b*) *Arnold* v. *Smith*, 1896, 1 Ch. 171.
(*c*) *Nixon* v. *Cameron*, 26 Ch. D. 19.
(*d*) *Owen* v. *Delamere*, L. R. 15 Eq. 134.

in such a case, personal judgment against the executor has been obtained, then (so far as regards the estate of the testator whose representatives the executors are), the question of indemnity is one which arises only as between the executors on the one hand and the beneficiaries on the other hand (*e*). Therefore, secondly, where (under the will) the executors have a power to carry on the business, the carrying on of the business (in that case) is a lawful execution by them of the trusts of the will,—and the creditors will then (by subrogation to the executors) have this other or further right, namely,—a right to go against the assets of the deceased testator, to be paid their debts thereout: which latter right is, apparently, alternative (and not cumulative (*f*)),—and is exercised and enforced according to the distinctions following, that is to say:—

(2) Where a power in the will to do so:

The testator sometimes limits the power of the executors to a specific part of his assets; and sometimes he declares, that his whole estate (or general assets) shall be available for the purposes of the business; and sometimes he does neither the one of these two things nor the other.

(a) Cases in which the property already in the business, and that property only, is available;

And, firstly, if he do neither of them, then it appears, that (as a general rule) the property which was in the business at the date of the testator's death (and that property only) may lawfully continue to be used therein (*g*), —In which case, the creditors of the executors have not any right (by subrogation or otherwise) against the general assets (*h*).

(b) Cases in which the whole estate (or the general assets) are available;

Secondly, if the general assets have been expressly made available for the purposes of the business, the whole estate becomes (in effect) a fund for the creditors of the executors,—*Scil.*, by subrogation to the executors,—In which case, the creditors of the executors have priority (*semble*) over the creditors of the testator at the date of his

(*e*) *Brooke* v. *Brooke*, 1894, 2 Ch. 600.
(*f*) *Dowse* v. *Gorton*, 1891, A. C. 190.
(*g*) *McNeillie* v. *Acton*, 4 De G. M. & G. 744.
(*h*) *Strickland* v. *Symons*, 26 Ch. D. 245.

death (*i*),—the right of the executors to a full and complete indemnity (at the expense even of the testator's own creditors at the date of his death) being (in this case) open to no question at all:

(c) Cases in which only specific (or limited) assets available.

Thirdly, where the testator empowers his executors to employ only a limited portion of his assets for the purpose of carrying on the business,—The executors have (in this case) a right to resort to the limited assets only: hence it follows, that (in this case) the creditors also are entitled (by subrogation) to obtain payment of their debts out of such limited assets only (and not out of the general assets (*k*)). And, *nota bene*, this right of the executors (and right, by subrogation, of the creditors) extends also to damages recovered against the executors, in respect of a *tort* committed by them (being a tort naturally arising in the due carrying on of the business (*l*)).

Executor in default.—effect of that on him, and on the creditors of the business.

When the executor is himself in default to the limited or specific assets (which are available for the purposes of the business), he (the executor) is not (in such a case) entitled himself to any indemnity (except upon the terms of first making good his own default); and the creditors are in no better position (*m*); but where there were three executors, and one only of them was in default, the creditors were held entitled in respect of the other two (*n*).

Indemnity,—when a receiver and manager is, or is not, entitled to it?

As regards a receiver and manager appointed by the Court (in the winding-up of an estate or of a company, or in a debenture holders' action, or the like),—Seeing that (equally with an executor carrying on the business) he contracts a *personal* liability, therefore (equally with an executor) he is entitled to an indemnity out of the estate (*o*),—*Scil.*, out of the estate only (*p*), and to the extent only that he has been acting on behalf of the estate (*q*),

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(*i*) *Dowse* v. *Gorton*, *supra*.
(*k*) *Ex parte Garland*, 10 Ves. 52, 120.
(*l*) *Raybould* v *Turner*, 1900, 1 Ch. 199.
(*m*) *Evans* v. *Evans*, 34 Ch. D. 597.
(*n*) *Newton* v. *Ralfe*, 1902, 1 Ch. 342.
(*o*) *Burt* v. *Bull*, 1895, 1 Q. B. 276; *Strapp* v. *Bull*, 1895, 2 Ch. 1.
(*p*) *Boehm* v. *Goodall*, 1911, 1 Ch. 155.
(*q*) *Brinklow* v. *Singleton*, 1904, 1 Ch. 648.

but so as to include money lawfully borrowed for the purpose of carrying on the business (*r*). On the other hand, a receiver and manager not so appointed, but who is appointed by (*e.g.*) a mortgagee in the ordinary way, is not entitled to any indemnity,—*Scil.*, because he incurs no *personal* liability, but is merely an *agent* for his principal (*s*).

Now, if the receiver is entitled to be indemnified, then also the creditors, dealing with the receiver in connection with the estate, are entitled (by subrogation) to be paid their debts out of the estate; but that right of the general creditors, even where it exists, is not (in the case of a company) available as against the debenture holders, or other the *secured* creditors of the company (*t*). Also, a loan which was *ultra vires* the receiver would not (under the doctrine of subrogation) be entitled to be paid or repaid out of the assets of the company,—*Scil.*, in competition with any of the other creditors of the company (*u*), but only (if at all) by subrogation to the rights of the creditors (if any) whose debts had been, in fact, discharged by means of the loan (*x*).

Executors carrying on the business,—and making a loss and also a gain,—distinction according as the executors have or have not power to carry on the business.

Where the executor or trustee has no right to carry on the business of the deceased testator, and he nevertheless carries it on, he (the executor), if entitled at all to an indemnity, will not be entitled to an indemnity as a matter of course,—Whence it follows, that (in such a case) the creditors have no right (by subrogation or otherwise) to be paid out of the assets of the testator (*y*); and if (in such a case) the executor makes a loss and makes also a gain, he is not entitled to set off the loss against the gain (*z*), but is personally liable to make good the loss. And it is precisely in these respects, that an executor (or trustee), who carries on the business under an express or implied power in the will to do so, differs from (and is

(*r*) *Halifax Bank* v. *British Power*, 1907, 1 Ch. 528; and see (*S.C.*), 1910, 2 Ch. 470.
(*s*) *Owen* v. *Cronk*, 1895, 1 Q. B. 265.
(*t*) *In re Wrexham, &c. R. C.*, 1899, 1 Ch. 400.
(*u*) *Portsea Island* v. *Barclay*, 1895, 2 Ch. 298.
(*x*) *Blackburn Society* v. *Cunliffes*, 22 Ch. D. 71.
(*y*) *Strickland* v. *Symons*, 26 Ch. D. 245.
(*z*) *Wiles* v. *Gresham*, 1 Drew. 258.

more favourably circumstanced than) an executor or trustee who carries on the business without any such power (*a*).

How varying profits and losses are to be dealt with, —in case of business being lawfully carried on.

When the executors carry on a trade under a power or direction in that behalf contained in the will, and there are successive tenants for life and remaindermen, successively entitled under the will, the will ought to provide (as between these beneficiaries) for the possible alternation of profit and loss during the successive tenancies; and if the will has neglected to so provide, then the losses, (1) so far as they are ordinary losses (such as bad debts), will be made good out of the subsequent profits (*b*); but (2) so far as they are not of that character, they will be written off against (and in reduction of) capital (*c*), *semble*.

Remedies of *cestui que trust*, in event of a breach of trust.

(1) *Personal* remedies.

The remedies of a *cestui que trust* (for a breach of trust) comprise, Firstly, the remedy in respect of the *personal* liability of the trustees (which is a joint and several liability); and (in certain cases) even the solicitors for the trustees (*d*),—and third parties generally (*e*),—will (in respect of the breach of trust) be substantively liable to the *cestuis que trustent*, and also collaterally liable to the trustees themselves,—*Scil.*, for negligence (*f*). And, *nota bene*, although these third parties (where liable at all) would be liable as constructive trustees only, yet (under exceptional circumstances) they have been held to be liable as *express* trustees, although *de son tort* only (*g*),—and sometimes even as *fraudulent* receivers (*h*):

(2) *Real* remedies.

And comprise, Secondly, the following other remedies,—sometimes called the *real* remedies of the *cestuis que trustent*, because they affect the trust property itself, and in a manner follow it,—That is to say:—

(1) Right of following the trust estate.

Firstly, If the alienee of the trust estate is a volunteer, then the estate may be followed into his hands (whether

(*a*) *Scott* v. *Lyon*, 34 Beav. 434.
(*b*) *Upton* v. *Brown*, 26 Ch. Div. 588.
(*c*) *Frowde* v. *Hengler*, 1893, 1 Ch. 586.
(*d*) *Blyth* v. *Fladgate*, 1891, 1 Ch. 337.
(*e*) *Heynes* v. *Dixon*, 1900, 2 Ch. 561.
(*f*) *Howell* v. *Young*, 5 B. & C. 259.
(*g*) *Barney* v. *Barney*, 1892, 2 Ch. 265.
(*h*) *Rolfe* v. *Gregory*, 4 De G. J. & S. 577.

he had notice of the trust or not); and if the alienee is a purchaser for value (*but with notice*), the same rule applies. But, *nota bene*, this remedy is not available, unless the funds are trust funds: And therefore it is not available in the case of mere *debts* (*i*),—nor (usually) against bankers, in respect of trust funds transferred from the trust account of a customer to the private account of the customer (*k*). And, if the alienee of trust funds is a purchaser for value *without notice*, and obtains the legal estate, his title cannot be impeached (*l*); but if he has, in the first instance, taken only an equitable conveyance, the trust estate may, in the general case, be followed (*m*); nor (in such latter case) would it help the purchaser, even although he should afterwards (on discovering the trust) have obtained a voluntary conveyance of the legal estate (*m*): *Secus*, if such subsequent conveyance is not purely voluntary (*n*).

Breach of trust,—made good by trustee himself.

Nota Bene,—If a trustee (who has been guilty of a breach of trust) makes good the breach out of his own property (although it should be immediately prior to his own bankruptcy), the trust estate is, in general, entitled to retain the benefit of that: That is to say, the general creditors of the trustee cannot set aside the transaction as a fraudulent preference (*o*),—*Scil.*, Because it is considered an *honest* fraudulent preference (*p*). Also, where the breach of trust consists in having made an unauthorised investment, the trustee may (or his executors may) sell the investment,—towards recouping his liability for the breach (*q*); and the sale may, in general, be made without first giving to the *cestuis que trustent* any notice of the intention to sell (*r*),—an unauthorised investment being (in that particular) different from an insufficient but authorised investment (*s*).

(*i*) *Lister* v. *Stubbs*, 45 Ch. Div. 1.
(*k*) *Coleman* v. *Bucks Bank*, 1897, 2 Ch. 243.
(*l*) *Fraser* v. *Murdoch*, 6 App. Ca. 855.
(*m*) *Carter* v. *Carter*, 3 K. & J. 617.
(*n*) *Taylor* v. *Russell*, 1892, A. C. 244.
(*o*) *Ex parte Stubbins*, 17 Ch. Div. 58.
(*p*) *Small* v. *Bradley*, 2 P. Wms. 427.
(*q*) *Power* v. *Banks*, 1901, 2 Ch. 487, 496.
(*r*) *In re Jenkins and Randall*, 1903, 2 Ch. 362.
(*s*) *Priest* v. *Uppleby*, 42 Ch. D. 351.

(2) Right of following the property into which the trust fund has been converted.

Secondly, If the trust estate has been tortiously disposed of by the trustee, the *cestui que trust* may also follow the property (whether land or any other property) that has been substituted in its place,—*Scil.*, so long as the substituted property can be traced (*t*). Money even may be followed by the rightful owner,—also bills and notes,—unless where they have been paid away or negotiated without notice of the trust (*u*); and, in fact, the only difference between money on the one hand and notes and bills on the other is, that money is not ear-marked,—and therefore cannot (except under peculiar circumstances) be traced (*x*); but notes and bills, from carrying a number or a date, can (in general) be identified by the owner without difficulty (*y*). But the necessity for identification does not arise, where the trust property is still in the hands of the trustee,—*Scil.*, Because if the trustee mixes the trust money with his own money, the *cestui que trust* is entitled to every portion of the blended property which the trustee cannot prove to be his own (*z*).

If the trust estate has been invested (under an express power in that behalf) in the purchase of land, and the trustee adds money of his own in order to make up the full purchase-moneys,—or raises such extra money by an "*attempted mortgage*" of the purchased lands,—He (the trustee), and also his mortgagee, have a right to be indemnified out of the purchased property the extra money so paid (or raised); but their right of indemnity is subject to the prior right of securing the full amount of the trust money,—and (subject to such prior right, and to the right of indemnity) the purchase enures wholly for the benefit of the trust (*a*). Also, if the trust estate has been wrongfully applied in the purchase of land,—And afterwards the trustee dies intestate and without heirs; and the land accordingly escheats,—if freehold, to the

(*t*) *Wilson* v. *Foreman*, 2 Dick. 593.
(*u*) *In re Hallett & Co.*, 1894, 2 Q. B. 237.
(*x*) *Scott* v. *Surman*, Willes, 400.
(*y*) *Birt* v. *Burt*, 11 Ch. D. 773, n.
(*z*) *Hancock* v. *Smith*, 41 Ch. Div. 456.
(*a*) *Worcester Bank* v. *Blick*, 22 Ch. Div. 255.

crown; or if copyhold, to the lord,—The land may still be followed notwithstanding (*b*).

(3) The beneficial estate (if equitable) of the trustee, and the interest of the *cestui que trust*, guilty of or participating in a breach of trust, may be "impounded."

Thirdly, If a trustee who has been guilty of a breach of trust has any beneficial interest under the trust instrument,—and his interest is *equitable*,—the Court will not allow him to receive any part of the trust fund in which he is equitably interested, and relative to which the breach of trust has been committed (*c*), until he has made good the breach of trust,—which remedy is called "*impounding*" his beneficial interest (*d*); but the Court cannot apply this remedy, if (or so far as) the trustee's beneficial interest under the deed or will is *legal* (*e*),—"the Court having no power to lay hold of the *legal* interest in order to recoup the breach of trust." In like manner, the beneficial interest of any *cestui que trust* (who has participated in the breach of trust) may be impounded to make good the breach,—*Scil.*, if such interest is equitable (which it usually is) (*f*); and this remedy is now available in the case of a married woman beneficiary, even where she is restrained from anticipation (*g*). Also, and upon the like principle, legatees of residue (who are indebted to the estate) must first pay up their debts before they are permitted to share in the residue (*h*),—and that is so, even where the debts in question are statute-barred (*i*); and even specific legatees are subject to this rule (*k*). Also, covenantors in settlements (*l*),—and in separation deeds (*m*),—must first make good their breaches of covenant, before they will be permitted to receive their beneficial interests (whether legal or equitable) under the deed.

The equitable right of impounding the beneficial interest has priority over the right of a mortgagee of the

(*b*) *Hughes* v. *Wells*, 9 Ha. 749.
(*c*) *In re Towndrow*, *Gratton* v. *Machen*, 1911, 1 Ch. 662.
(*d*) *Woodyatt* v. *Gresley*, 8 Sim. 180.
(*e*) *Fox* v. *Buckley*, 3 Ch. Div. 508.
(*f*) *Raby* v. *Ridehalgh*, 7 De G. M. & G. 104.
(*g*) *Holt* v. *Holt*, 1897, 2 Ch. 525.
(*h*) *Courtenay* v. *Williams*, 3 Ha. 539.
(*i*) *Akerman* v. *Akerman*, 1891, 3 Ch. 212.
(*k*) *Taylor* v. *Wade*, 1894, 1 Ch. 671.
(*l*) *Priddy* v. *Rose*, 3 Mer. 86.
(*m*) *Davies* v. *Tagart*, 1900, 2 Ch. 64.

beneficial interest of the beneficiary (*n*); and also over the right of the trustee in bankruptcy of the beneficiary (*o*),—*Scil.*, when the indebtedness is a true indebtedness (*i.e.*, a *debt*, and not a mere *liability* (*p*)) of the beneficiary. But if (and so far as) there has been an appropriation to meet and answer the beneficiary's legacy or share, the mortgagee would, *semble*, have priority over the equitable right of impounding (*q*).

Interest payable by trustees, on a breach of trust.

If a trustee is guilty of any undue delay in investing or in transferring the fund, he will be answerable to the *cestui que trust* for interest during the period of his laches,—the rate being usually four (and not three) per cent. (*r*). Also, the Court will charge more than four per cent. (that is to say, will charge five per cent.),—and will still charge that (*s*),—upon balances in the hands of a trustee, in the following cases, that is to say:

(1) Where the trustee ought to have received more, —as where he has improperly called in a mortgage carrying five per cent.;
(2) Where he has actually received more than four per cent. (*t*);
(3) Where he must be presumed to have received more, —as if he has traded with the money; and
(4) Where the trustee is guilty of direct breaches of trust or of gross misconduct (*u*).

The Court will also, in a proper case, charge a trustee (*x*),—and also an executor (*y*),—with *compound* interest; and half-yearly rests will sometimes be directed in the account,—but not as a rule (*z*). And when a trustee

(*n*) *Bolton* v. *Curre*, 1895, 1 Ch. 541.
(*o*) *Turner* v. *Watson*, 1896, 1 Ch. 925.
(*p*) *Lee* v. *Binns*, 1896, 2 Ch. 584.
(*q*) *Supra*, p. 54.
(*r*) *Owen* v. *Richmond*, 1895, W. N. p. 29.
(*s*) *In re Davis*, 1902, 2 Ch. 314.
(*t*) *Emmet* v. *Emmet*, 17 Ch. Div. 142.
(*u*) *Townend* v. *Townend*, 1 Giff. 212.
(*x*) *Barclay* v. *Andrew*, 1899, 1 Ch. 674.
(*y*) *Emmet* v. *Emmet*, *supra*.
(*z*) *Burdick* v. *Garrick*, L. R. 5 Ch. App. 233.

has himself traded with the trust money, the *cestui que trust* may (at his option) take, in lieu of the five per cent. interest, the whole of the trade-profits (*a*),—leaving all the trade-losses to remain with the trustee (*b*); but, of course, a trader who has borrowed the trust money from the trustee, is not subject to any such rule,—even although he knows that the money lent to him is trust money (*c*).

Remedies against Trustee,—for a breach of trust,—bar of: (1) By time.

The debt created by a breach of trust being only a simple contract debt, the trustee's acceptance by *deed* of the trust not making it a specialty debt (*d*),—The remedy for it will now (under s. 8 of the Trustee Act, 1888) be barred after six years from the date of the breach,—or will be then (in effect) barred,—*Scil.*, unless where the breach of trust is a fraudulent one; and a fraudulent trustee will not, now, be released (*e*), even if he go bankrupt, and obtain his discharge under s. 30 of the Bankruptcy Act, 1883.

(2) By acquiescence;

The remedy against a trustee may also be barred by the *cestui que trust's* acquiescence (*f*); but there can be no acquiescence without knowledge (*g*),—*Scil.*, Because acquiescence is (or amounts to) an *implied* release, and even an express release (executed without full knowledge) would not be binding (*h*). Also, the concurrence of the *cestui que trust* in a breach of trust is, of course, a full discharge of the trustee from all liability therefor, to such *concurring* person (and to all others subsequently claiming under him) (*i*),—Excepting that *concurrence* implies *capacity*, and persons under disability (as married women (*k*), or infants (*l*)) may still successfully proceed

(3) By concurrence in breach of trust.

(*a*) *Jones* v. *Foxall*, 15 Beav. 392.
(*b*) *Wiles* v. *Gresham*, 1 Drew. 258; *Deines* v. *Scott*, 4 Russ. 195.
(*c*) *Stroud* v. *Gwyer*, 28 Beav. 130.
(*d*) *Holland* v. *Holland*, L. R. 4 Ch. App. 449.
(*e*) *Munns* v. *Burn*, 35 Ch. Div. 266.
(*f*) *London Financial Association* v. *Kelk*, 26 Ch. Div. 107.
(*g*) *Jacques Cartier* v. *Montreal City Bank*, 13 App. Ca. 111.
(*h*) *Walker* v. *Symmonds*, 3 Swanst. 1, 463.
(*i*) *Bridger* v. *Deane*, 42 Ch. Div. 9.
(*k*) *Parkes* v. *White*, 11 Ves. 221.
(*l*) *Wilkinson* v. *Parry*, 4 Russ. 276.

against the trustee for the breach of trust,—unless they have themselves been *actively* participant therein (*m*): In which latter case, it would be fraudulent on their parts to seek relief.

But, as regards married women, who had been actively participant in the breach,—Where they were entitled for their separate use and without power of anticipation (*n*), they sometimes proceeded,—and proceeded successfully, —against the trustee. It is true, that some of the judges demurred occasionally to that (*o*),—and occasionally gave the trustees liberty to retain their costs (*e.g.*) out of the married woman's income notwithstanding the restraint. But, in the general case, the trustee was, in effect, remediless against such a *cestui que trust*,—Until the Married Women's Property Act, 1893 (*p*): Whereby it was enacted (by s. 2), that a married woman's separate estate, although restrained, should be liable for such costs(*q*),—*Scil.*, for the costs of litigation *instituted* by her (*r*); and not therefore also for her costs of defence (*s*),—or for her costs of appealing (*t*). And the Trustee Act, 1893(*u*), s. 45 (re-enacting the like provision contained in the Trustee Act, 1888, s. 6), has now provided, that when the breach of trust has been committed at the "instigation or request" (or with the "written consent") of the married woman (*x*), the Court may order her beneficial estate or interest to be impounded,—*Scil.*, by way of remedy for the breach:

(4) By confirmation of breach of trust.

A *cestui que trust* may also, by subsequent confirmation, prevent himself from taking proceedings against his trustee for a breach of trust; but the purported confirmation will not be binding on him, unless he had

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(*m*) *Sawyer* v. *Sawyer*, 28 Ch. Div. 595.
(*n*) *Bateman* v. *Faber*, 1898, 1 Ch. 144.
(*o*) *Ellis* v. *Johnson*, 31 Ch. D. 532.
(*p*) 56 & 57 Vict. c. 63.
(*q*) *Pawley* v. *Pawley*, 1905, 1 Ch. 593.
(*r*) *In re Lumley*, 1894, 3 Ch. 135.
(*s*) *Hood-Barrs* v. *Cathcart*, 1895, 1 Q. B. 873.
(*t*) *Hood-Barrs* v. *Heriot*, 1897, A. C. 177.
(*u*) 56 & 57 Vict. c. 53.
(*x*) *Griffith* v. *Hughes*, 1892, 3 Ch. 106.

a full knowledge of the facts of the case (*y*),—A confirmation being (in this respect) exactly like a release (*z*).

Settlement of accounts.

A trustee is entitled to have his accounts examined and settled,—and at the cost of the trust estate (*a*): That is to say, if the *cestui que trust* is satisfied, that nothing more is due to him, he ought (being *sui juris*) to settle the account,—For he is not to keep a Chancery suit hanging indefinitely over the head of the trustee: And upon the question, whether a trustee (including an executor) is entitled on the conclusion of his trust (or executorship) to demand a release under seal, or must be content with the common receipt as his acquittance,—the better opinion (and the practice also) is, to give him a release under seal (*b*); and, *semble*, whenever any indemnity may lawfully be required, the discharge should be by release under seal,—the indemnity and the release being included in one and the same deed, of course.

Release under seal,—right to.

Surcharging and falsifying.

As a rule, settled accounts are not opened (*i.e.*, taken over again throughout, or *in toto*); but in an action for an account,—or which involves an account,—when the plea of settled account is put forward in defence (*c*),—The practice of the Court is, upon proof of one clear omission or insertion that is erroneous, to give liberty to the plaintiff to *surcharge* the omission and to falsify the *insertion*, together with all other erroneous omissions and insertions: Which liberty is commonly called the "*liberty to surcharge and falsify*" (*d*); and the errors need not be of a fraudulent (*e*),—but must be of a substantial (*f*),—character: But the account will be readily opened *in toto*, if the defendant (the party accountable) is in a fiduciary relation (*g*).

Trustee Act, 1893,—trustee's release under, on

Under the Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 25—41,—continuing the like provisions contained in

(*y*) *Burrows* v. *Walls*, 5 De G. M. & G. 254.
(*z*) *Walker* v. *Symmonds*, *supra*.
(*a*) *Cooper* v. *Skinner*, 1904, 1 Ch. 289.
(*b*) *Re Cater's Trusts*, 25 Beav. 366.
(*c*) *Hunter* v. *Dowling*, 1893, 1 Ch. 391.
(*d*) *Blagrave* v. *Routh* (Mortgage for Bill of Costs), 2 K. & J. 509, 522.
(*e*) *Williamson* v. *Barbour*, 9 Ch. Div. 529.
(*f*) *Lambert* v. *Still*, 1894, 1 Ch. 73.
(*g*) *Coleman* v. *Mellersh*, 2 Mac. & G. 309.

appointment of new trustees.

the Trustee Act, 1850 (*h*), and in the Trustee Extension Act, 1852 (*i*),—the Court may appoint a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees,—whenever it is expedient to make such appointment, and it is inexpedient, difficult, or impracticable to do so without the aid of the Court. But, *nota bene*, as regards any breach of trust then already committed (or liability then already incurred), no such appointment is to operate further or otherwise (as a discharge to the retiring trustee) than the like appointment under an express power in the instrument of trust would have done. And it is to be here observed, Firstly, that a new trustee, as regards all (if any) breaches of trust which have happened or been committed *before* his appointment, is under the like duty to recover the outstanding damages therefor, as he would be under, if these damages were some original parcel of the trust property still left outstanding (*k*),—only if the proceedings would be hopeless of any good result, the new trustee need not proceed at all (*l*). And it is to be here observed, Secondly, as regards a trustee who has retired, although he will not, in general, be responsible for any breach of trust committed *subsequently* to his retirement, still if it appear that the breach of trust was, in fact, contemplated at the time of his retirement, and that his retirement was the means adopted to facilitate its being committed, he will (or may) be held liable for that (*m*).

Provisions of the Conveyancing Acts, 1881, 1882 and 1892;

The occasions for having recourse to the Trustee Acts, 1850 and 1852, were latterly very much diminished by and in consequence of the Conveyancing Act, 1881 (*n*), ss. 31—34, which provided for the appointment of new trustees [by the person in that behalf referred to in the Act], and for the vesting of the trust property in these new trustees jointly with any of the old (and continuing) trustees,—the appointor merely making for this latter purpose a declaration that the property should so vest; and

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(*h*) 13 & 14 Vict. c. 60.
(*i*) 15 & 16 Vict. c. 55.
(*k*) *Hobday* v. *Peters*, 28 Beav. 603.
(*l*) *In re Forest of Dean Coal Co.*, 10 Ch. D. 450.
(*m*) *In re Broaden*, 38 Ch. D. 546; *Head* v. *Gould*, 1898, 2 Ch. 250.
(*n*) 44 & 45 Vict. c. 41.

the new appointment operated, in general, to release the retiring trustee or trustees; and these provisions of the Act of 1881 were retrospective. Also, under the Conveyancing Act, 1882 (*o*), s. 5, as amended by the Conveyancing Act, 1892 (*p*), s. 6, on the appointment of new trustees, separate sets of trustees might have been appointed for separate properties held upon separate or distinct trusts (*q*): and all these provisions (as well of the Conveyancing Act, 1881, as also of the Conveyancing Acts, 1882 and 1892), although nominally repealed, are (in substance) continued, by the Trustee Act, 1893, ss. 10—12 (*r*).

And now of Trustee Act, 1893.

Also, apart altogether from legislation, the Court always had (and still has) an inherent jurisdiction, to remove old trustees and to appoint new ones in their places (*s*); and the Court assumes (and also exercises) jurisdiction, where the interests of the beneficiaries appear to require it,—and even in cases where no personal fault is attributable to the old trustees (*t*),—and even as against trustees who are executors (*u*),—*Scil.*, Because the interests of the trust are the matter of paramount regard with the Court. And, *e.g.*, if a trustee becomes a bankrupt, that is a ground for his removal (*v*); but it does not follow, that the Court will, in fact, remove him on that ground,—the Court only doing it where the security of the estate may appear to require the removal (*x*).

Removal of trustees generally.

And here it is important to observe, that, upon the death of the last survivor of two or more trustees, his legal personal representative may,—in general, but not invariably (*y*),—either accept (and continue to execute)

(*o*) 45 & 46 Vict. c. 39.
(*p*) 55 & 56 Vict. c. 13.
(*q*) *In re Parker's Trusts*, 1894, 1 Ch. 707.
(*r*) *Wheeler* v. *De Rochow*, 1896, 1 Ch. 315.
(*s*) *In re Wrightson*, 1908, 1 Ch. 789.
(*t*) *In re Moss's Trusts*, 37 Ch. Div. 518.
(*u*) *In re Ratcliff*, 1898, 2 Ch. 352.
(*v*) 56 & 57 Vict. c. 53, s. 25.
(*x*) *Bowen* v. *Phillips*, 1897, 1 Ch. 174.
(*y*) *In re Crunden and Meux*, 1909, 1 Ch. 690.

the trust (*z*) or decline to do so (*a*),—*Scil.*, until there is a new appointment of trustees (*b*).

Trustee Act, 1893,—trustee's release under, on payment or transfer into Court.

Under the Trustee Act, 1893, s. 42 (continuing the like provisions contained in the Trustee Relief Acts, 1847, 1849 (*c*)), trustees and executors, or the major part of them, may,—on affidavit, and without either action or other legal proceeding,—pay trust moneys into the Bank of England to the account of the Paymaster-General (Chancery Division) in the matter of the particular trust, —and also transfer or deposit trust stocks and securities into or in the name of such Paymaster-General, a proceeding which is, of course, only to be taken in a case of difficulty (*d*): and a life assurance company also may (but only in the like case of difficulty) pay the policy moneys into Court (*e*). After such payment or transfer into Court (*and to the extent thereof*), the trustees are discharged of all control over the trust, and of all duties as trustees or executors (*f*); but they must give the *cestuis que trustent* notice of their having made the payment or transfer; and thereafter the Court takes charge of the trust fund and invests it,—and upon petition (or, as the case may be, on summons) by any person claiming title thereto, the Court will (upon notice to the trustees or executors) make an order for the payment out of the fund,—first deciding any question of law or of fact incidental to such payment out,—unless (which rarely happens) the Court finds that the difficulties are such as to justify the institution of an action for the determination of the question involved (*g*).

Public Trustee,—constitution of;

By the Public Trustee Act, 1907 (6 Edw. VII. c. 55), —an Act which came into operation on the 1st January,

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(*z*) *In re Waidanis*, 1908, 1 Ch. 123.
(*a*) *Legg* v. *Mackrell*, 2 De G. F. & J. 551; *Robson* v. *Flight*, 4 De G. J. & S. 608.
(*b*) *In re Routledge*, 1909, 1 Ch. 280.
(*c*) 10 & 11 Vict. c. 96; 12 & 13 Vict. c. 74.
(*d*) *Re Hood*, 1896, 1 Ch. 270.
(*e*) 59 & 60 Vict. c. 8.
(*f*) *Re Coe*, 4 K. & J. 199.
(*g*) *Re Bloye*, 1 Mac. & G. 488.

1908,—a public trustee has been established (s. 1),—and he is a corporation; and (by s. 2) such trustee may (on being requested to do so) accept the administration of estates of small value (*Scil.*, estates not exceeding, at the date of the application (*h*), £1,000),—and may accept also the administration of the property of convicted felons. But (save as aforesaid) he is not to accept the administration of any trust which involves the carrying on of any business,—nor the administration of an insolvent estate,—nor the execution of the trusts of any "Deed of Arrangement,"—nor the execution of any religious or charitable trust. And when he accepts any trust, he may do so, either as a custodian trustee merely or as an ordinary trustee.

and varieties of.

Where the public trustee has been appointed a trustee, and his appointment has been only as a custodian trustee, —Then (by s. 4) all the trust property is to be transferred to and vested in him, as if he were the sole trustee; and all the securities and documents of title belonging to the trust or relating to the trust property are also to be delivered over into his sole custody; and the private trustees of the deed or will (and who in the Act are called the "*managing trustees*") continue, in that case, to execute the trusts,—the custodian trustee concurring only with them (where and so far as his concurrence is necessary), and affording them access to (and reasonable inspection of) the securities and documents of title.

Public Trustee, when he is a custodian trustee, —position of, relatively to the "*managing trustees.*"

Where the public trustee has been appointed a trustee, and he has been appointed an ordinary trustee,—*Scil.*, by the deed or will creating the trust,—he is like any other ordinary trustee,—excepting that he may exercise limited judicial powers subject to appeal (*i*); also, he may be either the sole trustee or one of several co-trustees; and on any appointment of new ordinary trustees, the public trustee may be appointed either as one of the new trustees (*k*), or as the *sole* new trustee (s. 5, sub-s. 1 (*l*)). Also, where

Public Trustee, when he is an ordinary trustee,—position of;

(*h*) *In re Devereux*, *Toovey* v. *P. T.*, 1911, July 29, The Times Report.
(*i*) *In re Oddy*, 1911, 1 Ch. 532.
(*k*) *In re Kensit*, 1908, W. N. 235.
(*l*) *In re Leslie's Hassop Estates*, 1911, 1 Ch. 611.

and retirement of the other trustees.

the public trustee has been appointed (either originally or subsequently) a co-trustee with others, these others may (if they choose to do so) afterwards retire, leaving the public trustee to remain the sole trustee (s. 5, sub-s. 2). The public trustee (when appointed by will) may obtain a grant of probate or of administration (s. 6, sub-s. 1); and an executor or administrator who has already obtained probate or administration may (subject to observing certain formalities) transfer to the public trustee the whole future administration of the estate,—and (in that way) escape from all liability in respect of the further administration (s. 6, sub-s. 2).

But, *nota bene*, the public trustee, being a corporation, cannot be admitted to the copyhold hereditaments (if any) which are subject to the trust (*m*).

(*m*) Scriv. on Copyholds, 7th ed., 1896, on p. 137.

CHAPTER VII.

DONATIONES MORTIS CAUSA.

A *donatio mortis causâ* is a gift, made "in the expectation of death," and on condition to be absolute only on the death (*a*); and if the donor recovers from the illness (or, while still living, resumes the possession), the gift will not take effect (*b*).

(1) Must be made in expectation of death; (2) On condition to become absolute on donor's death; and (3) Delivery is essential.

Delivery is essential to the validity of a *donatio mortis causâ*;—and if there be no *delivery*, the gift (although intended) is ineffectual (*c*),—and will not be aided, in equity, *in favour of a volunteer* (*d*): But if only there be *delivery* (*e*), the gift will be good,—although the writing (if any) which accompanies it should not be attested at all (*f*), and although there should be no writing at all (*g*); and there may be annexed to the gift an express condition,—as (*e.g.*) that the donee shall pay the funeral expenses of the donor (*h*). But, *nota bene*, an *antecedent* delivery to the donee in the character of *bailee* will not suffice, *unless the quality of the possession be changed before the death* (*i*).

What is a sufficient delivery.

Delivery being essential, it follows, that, without delivery, neither a testamentary gift (which is ineffectual as such (*k*)), nor a gift *inter vivos* (which is ineffectual as such), will be supported as a *donatio mortis causâ* (*l*).

(a) To donee or donee's agent.

(*a*) *Duffield* v. *Elwes*, 1 Bligh, N. S. 530.
(*b*) *Edwards* v. *Jones*, 1 My. & Cr. 233.
(*c*) *Rigden* v. *Vallier*, 2 Ves. Sr. 258.
(*d*) *Morgan* v. *Malleson*, L. R. 10 Eq. 475.
(*e*) *Kilpin* v. *Ratley*, 1892, 1 Q. B. 582.
(*f*) *Moore* v. *Darton*, 4 De G. & Sm. 519.
(*g*) *Tate* v. *Gilbert*, 2 Ves. Jr. 120.
(*h*) *Hills* v. *Hills*, 8 Mee. & W. 401.
(*i*) *Cain* v. *Moon*, 1896, 2 Q. B. 283.
(*k*) *Treasury Solicitor* v. *Lewis*, 1900, 2 Ch. 812.
(*l*) *Edwards* v. *Jones*, 1 My. & Cr. 226.

(b) Delivery of effective means of obtaining the property.

Also, delivery to an agent for the donor will amount to nothing (*m*),—for an effective delivery must be to the donee, or to the donee's agent (*n*). And where the chattel itself is not delivered, the delivery of a mere ineffective symbol of it is not sufficient (*o*), *secus*, the delivery of some effective means of obtaining it,—for example, the key of a box (*p*), or (in the case of a *chose in action*) the savings bank book (*q*), or other essential document (*r*).

Examples of imperfect delivery:
(a) Delivery to donor's agent.

(b) Delivery to donor's agent, coupled with retention of ownership.

Where the key of a box, containing some bonds labelled "The first five of these bonds belong to and are H. D.'s property," was given into the custody of H. D. (who was the testator's housekeeper),—the Court was of opinion that the testator gave the key to H. D. *in her character of housekeeper only, and for the purpose of taking care of it for his benefit only* (*s*). And similarly, where A. (being in his last illness) ordered a box containing wearing apparel to be carried to the defendant's house, to be delivered to the defendant; and on the next day, the defendant brought back the key of the box to A. (who desired it to be taken back, saying he should want a pair of breeches out of the box),—the Court held this also not to be a good *donatio mortis causâ* (*t*).

What may, and what may not, be given as *donatio mortis causâ*.

There cannot, of course, be any *donatio mortis causâ* of real estate; and there could not, it seems, be a good *donatio mortis causâ* of South Sea annuities (*u*),—nor can there be of Government stock (*x*), railway stock (*y*), or building society shares (*z*). And as regards the donor's own cheque upon his bankers, it appears, that if the cheque is paid before the death (*a*),—or is presented and (*the account being in credit*) is acknowledged for payment (although

(*m*) *Farquharson* v. *Cave*, 2 Coll. C. C. 367.
(*n*) *Shenstone* v. *Brock*, 36 Ch. Div. 541.
(*o*) *Snellgrove* v. *Baily*, 3 Atk. 214.
(*p*) *Jones* v. *Selby*, Prec. in Ch. 300.
(*q*) *Bartholomew* v. *Menzies*, 1902, 1 Ch. 680.
(*r*) *Moore* v. *Darton*, 4 De G. & Sm. 519.
(*s*) *Trimmer* v. *Danby*, 25 L. J. Ch. 424.
(*t*) *Hawkins* v. *Blewitt*, 2 Esp. 663.
(*u*) *Ward* v. *Turner*, 2 Ves. Sr. 431.
(*x*) *Andrews* v. *Andrews*, 1902, 2 Ch. 394.
(*y*) *Moore* v. *Moore*, L. R. 18 Eq. 474.
(*z*) *Bartholomew* v. *Menzies*, *supra*.
(*a*) *Rolls* v. *Pearce*, L. R. 5 Ch. Div. 730.

not actually paid) before the death (*b*),—There is a good *donatio mortis causâ* of it: *Secus*, if the account is *overdrawn* at the date of the presentation of the cheque,—and there is, consequently, no acknowledgment of it for payment (*c*),—because, *nota bene*, a cheque is not, of itself, an appropriation (as has been already stated on p. 49, *supra*):

On the other hand, there may be a good *donatio mortis causâ* of a bond (*d*), or of a mortgage debt (*e*), or of cash on deposit at a bank (*f*). Also, the delivery of a promissory note payable to order, though not endorsed (*g*),—or of a third party's cheque payable to order, though not endorsed (*h*),—or of a deposit note (*i*), although with form of cheque endorsed thereon (*k*),—will constitute a good *donatio mortis causâ*. And where a mortgage deed (with the accompanying bond, if any) is given up by the dying mortgagee, to the mortgagor, and then the mortgagee dies,—That is a gift (or cancellation) of the debt (*l*): But where a promissory note has been lost, and the payee directs it to be destroyed when found, and then dies,—that will not,—in the general case (*m*), although sometimes it will (*n*),—amount to a gift thereof.

How a *donatio mortis causâ* differs from a legacy, and agrees with a gift *inter vivos*.

A *donatio mortis causâ* differs from a legacy in these respects:—

(1) It takes effect (*sub modo*) from the date of the delivery,—and therefore it need not be proved as a testamentary act; and

(2) It requires no assent on the part of the executor (or administrator) to perfect the title of the donee.

(*b*) *Bromley* v. *Brunton*, L. R. 6 Eq. 275.
(*c*) *Beaumont* v. *Ewbank*, 1902, 1 Ch. 889.
(*d*) *Snellgrove* v. *Baily*, 3 Atk. 214.
(*e*) *Duffield* v. *Elwes*, 1 Bligh, N. S. 497.
(*f*) *Andrews* v. *Andrews*, 1902, 2 Ch. 394.
(*g*) *Veal* v. *Veal*, 27 Beav. 303.
(*h*) *Clement* v. *Cheeseman*, 27 Ch. Div. 631.
(*i*) *Griffin* v. *Griffin*, 1899, 1 Ch. 408.
(*k*) *Duffin* v. *Duffin*, 44 Ch. Div. 76.
(*l*) *Hurst* v. *Beach*, 5 Madd. 351.
(*m*) *Francis* v. *Bruce*, 44 Ch. Div. 627.
(*n*) *Edwards* v. *Walters*, 1896, 2 Ch. 157.

How it resembles a legacy, and differs from a gift *inter vivos*.

A *donatio mortis causâ* resembles a legacy in these respects:—

(1) It is revocable during the donor's lifetime (*o*);
(2) It may be made (even at law) to the donor's wife (*p*);
(3) It is liable to the debts of the donor on a deficiency of assets (*q*);
(4) It is subject to legacy duty, in all cases where a legacy would be so subject; and
(5) It used to be subject to "*account stamp duty*" (*r*), —and is now subject (in effect) to estate duty (*s*):

Which latter duty used to be considered a "testamentary expense" (*t*),—and so was payable out of the general residuary estate (*u*); but, *semble*, it is not now so considered,—nor so paid (*x*). Also, as regards settlement estate duty, that is not a "testamentary expense" (*y*),—and therefore will be payable out of the *donatio mortis causâ* itself,—at least, in the general case (*z*), but not invariably so (*a*). And as regards property which is subject to a general power of appointment, if the testatrix does *not* exercise the power, the estate-duty on that is not a "testamentary expense" of hers (*b*).

(*o*) *Smith* v. *Casen*, 1 P. W. 406.
(*p*) *Tate* v. *Leithead*, Kay, 658.
(*q*) *Smith* v. *Casen*, *supra*.
(*r*) *Thomas* v. *Foster*, 1897, 1 Ch. 484.
(*s*) *Wade* v. *Wade*, 1898, 2 Ch. 276.
(*t*) *Yeo* v. *Clemow*, 1900, 2 Ch. 182.
(*u*) *In re Hadley*, 1909, 1 Ch. 20.
(*x*) *In re Hudson*, 1911, 1 Ch. 206.
(*y*) *Travers* v. *Kelly*, 1904, 1 Ch. 363.
(*z*) *Wilson* v. *Maryon-Wilson*, 1900, 1 Ch. 565.
(*a*) *Sharpe* v. *Hodgson*, 1904, 2 Ch. 345.
(*b*) *Porte* v. *Williams*, 1911, 1 Ch. 188.

CHAPTER VIII.

LEGACIES.

Assent to, or appropriation for, legacy or share of residue,—effect of.

In the case of a general pecuniary legacy, the legatee may sue the executors for it, after the executors have assented to it (*a*); and where the legacy is of a debt, and the executor refuses to sue the debtor for it, the legatee may (on account of the special circumstances) himself sue for it (*b*), —the executor being (in that case) added as a co-defendant. Also, in the case of a specific legacy, after the executor has assented thereto, the property vests immediately in the legatee,—Who may *thereafter* sue for it (*c*): And, if the specific bequest be of leaseholds, the assent of the executor is sufficient, without any express assignment (*d*). And if the executor (with the consent of the legatee) appropriates any specific asset in payment or satisfaction of a general pecuniary legacy, such specific asset thereupon becomes the property of the legatee (*e*),—with full right to all the net profits from the death (*f*): There may also be an effective appropriation to answer a residuary bequest (*g*),—or to answer a settled share of residue (*h*); and, even in the case of a *contingent* legacy, there may be such an appropriation,—but not so as to either exempt the residuary estate from its liability for the legacy (*i*), or to withdraw the appropriated assets from their liability for the debts (*k*).

(*a*) *Deeks* v. *Strutt*, 5 T. R. 690.
(*b*) *Beningfield* v. *Baxter*, 12 App. Ca. 167.
(*c*) *Doe* v. *Gay*, 3 East, 120.
(*d*) *Thorne* v. *Thorne*, 1893, 3 Ch. 196.
(*e*) *Dowsett* v. *Culver*, 1892, 1 Ch. 210.
(*f*) *In re West*, *West* v. *Roberts*, 1909, 2 Ch. 180.
(*g*) *Morgan* v. *Richardson*, 1896, 1 Ch. 512.
(*h*) *Nickels* v. *Nickels*, 1898, 1 Ch. 630; *Watson* v. *Watson*, 1901, 1 Ch. 681.
(*i*) *Foster* v. *Metcalfe*, 1903, 2 Ch. 226; *In re Evans and Bethell*, 1910, 2 Ch. 438.
(*k*) *Smith* v. *Day*, 2 Mee. & W. 684; *Noble* v. *Brett*, 24 Beav. 499.

Distinctions among the three kinds of legacies.

Legacies being either general, specific, or demonstrative, the chief points of difference among them are the following:—

(1) If, after payment of the debts, there is a deficiency of assets for payment of all the legacies in full, a general legacy will abate, but a specific legacy will not;

(2) If the chattel or fund which is specifically bequeathed fails (by alienation or otherwise) during the testator's lifetime, the legatee will not be entitled to any compensation out of the general assets (*l*),—*Scil.*, because nothing but the specific thing itself was given to the legatee (*m*),—the *animus adimandi* not being considered at all (*n*). But if the specific thing still exists, although *notionally* altered, the specific legacy of it will continue good (*o*).

(3) A demonstrative legacy is so far of the nature of a specific legacy, that it will not abate with the general legacies,—until the fund out of which it is payable is exhausted; and it is so far of the nature of a general legacy, that it will not be liable to ademption, by the alienation of the specific fund primarily designed for its payment (*p*).

Pecuniary legatee and residuary legatee—distinguished.

A pecuniary legatee is entitled (and, *à fortiori*, a specific or demonstrative legatee is entitled) to be paid his legacy in priority to the residuary legatee (*q*). But a legacy, apparently residuary, may not (for this purpose) be truly residuary; and, for example, where a sum of £4,000 was given to A. for life, with remainder as to £1,000 to X., and as to £1,000 to Y., and as to the "*residue*" to Z.,—and the £4,000 diminished,—X., Y., and Z. were all made to abate *pari passu* (*r*). And similarly, where in the like case the "*surplus*" was given (*s*).

(*l*) *In re Slater*, 1907, 1 Ch. 665.
(*m*) *In re Gittins*, 1909, 1 Ch. 345.
(*n*) *Frewen* v. *Frewen*, L. R. 10 Ch. App. 610.
(*o*) *In re Jameson*, 1908, 1 Ch. 111.
(*p*) *Vickers* v. *Pound*, 6 H. L. Cas. 885.
(*q*) See p. 147, *supra*.
(*r*) *Baker* v. *Farmer*, L. R. 4 Eq. 382; and see *Smith* v. *Margetts*, 1906, W. N. 44.
(*s*) *Dyose* v. *Dyose*, 1 P. Wms. 304.

Special priorities of certain legacies.

General pecuniary legatees are *inter se* payable *pari passu;* but the testator may have given to some of them a priority over the others,—In which latter case (if the estate is or proves insufficient), those having priority will be paid first,—and will not abate with the others (*t*); and legacies given in lieu of dower have, in general, priority (*u*),—*Scil.*, where (and only where) the testator, at the date of his decease, had lands out of which his widow was and remained dowable notwithstanding the will (*x*). But a mere direction that any particular legacy is to be paid immediately on the death of the testator (*y*), —or is to be paid first, and the others afterwards (*z*),— will not prevent it from abating (even in the case of a wife), if it is otherwise subject to abatement; and a legacy given to a creditor in satisfaction of his debt is not now held to be entitled to any priority (*a*).

Annuities,—where a trust or direction to purchase, and where only an option,—difference.

Annuities given by will are merely legacies in annuity-form, and where the will directs the purchase of a Government annuity for A. for her life, A. is entitled, in general, to take the purchase-money instead of the annuity (*b*),— so that if she survives the testator, and afterwards (and before receiving the purchase-price) she dies, her legal personal representative will be entitled to receive that price (*c*): But if the annuity is given with a restraint on anticipation, *and* (in case she attempts to anticipate it) it is given over, that will exclude her from taking the purchase-price instead (*d*).

Annuitant,—varying rights of, according as the annuity is given generally; or is charged upon

Usually, the will merely gives the annuity generally,— and, in that case, the annuitant is merely entitled to have the annuity secured,—*Scil.*, by the appropriation of a sufficient part of the estate to answer the annuity (*e*);

(*t*) *Wells* v. *Borwick*, 17 Ch. Div. 798.
(*u*) *Stahlschmidt* v. *Lett*, 1 Sm. & G. 421.
(*x*) *Greenwood* v. *Greenwood*, 1892, 2 Ch. 295.
(*y*) *Oppenheim* v. *Schweder*, 1891, 3 Ch. 44.
(*z*) *Beeston* v. *Booth*, 4 Madd. 161.
(*a*) *Wedmore* v. *Wedmore*, 1907, 2 Ch. 277.
(*b*) *Stokes* v. *Check*, 28 Beav. 620.
(*c*) *Bailey* v. *Bishop*, 9 Ves. 6; *Robbins* v. *Legge*, 1907, 2 Ch. 8.
(*d*) *Woodmeston* v. *Walker*, 2 Russ. & M. 197.
(*e*) *Scott* v. *Leak*, 42 Ch. D. 570; *Harbin* v. *Masterman*, 1896, 1 Ch. 351.

the real estate, with a trust or direction (or with a power only) to substitute a Government annuity for it.

and she is not entitled (nor would her legal personal representative be entitled) to receive the purchase-price for the annuity (*g*). Occasionally, however, the will charges the annuity on the real estate of the testator: In which latter case, the will sometimes adds a direction to purchase a Government annuity (in satisfaction of the bequest, and so as to release the real estate from the charge (*h*)); and sometimes the will merely gives the trustees a power to purchase such annuity in the event of their desiring (on a sale of the real estate) to release the real estate from the charge (*i*),—And it appears, that, in the former class of cases, the annuitant is entitled to the purchase-price of the annuity; but that, in the latter class of cases, the annuitant is entitled to the purchase-price, only in case she survives the completion of the sale, and not otherwise (*k*).

Real and personal estate,—relative liabilities of, for payment of annuity.

Annuity, charged on "*rents and profits*" (or on "*income*"), where a deficiency.

Where an annuity is charged upon land, the land is sometimes the *primary* debtor,—and may even be the *exclusive* debtor; but far more usually, the land is only *auxiliary* to the personal estate, and the personal estate is the *primary* debtor (*l*). Where the annuity is charged upon the "*rents and profits*" of the land, the charge will (usually) amount to a charge upon the *inheritance* itself (or *corpus*) of the land (*m*); more ordinarily, however, the annuity is (on the construction of the will) a charge against the *annual* rents and profits only,—and in that case, the subsequently accruing rents and profits will not, in general, be liable (*n*),—although they may be liable (*o*),—to make up the deficiency of any previous year: But where an annuity is given, and then, "*subject thereto,*" the real estate is given, the annuity is a charge on the *corpus* (*p*), and not on the annual rents and profits only.

(*g*) *Tucker* v. *Tucker*, 1893, 2 Ch. 323.
(*h*) *Palmer* v. *Craufurd*, 3 Sw. 482.
(*i*) *Power* v. *Hayne*, L. R. 8 Eq. 262.
(*k*) *Pitman* v. *Holborrow*, 1891, 1 Ch. 707.
(*l*) *Trenchard* v. *Trenchard*, 1905, 1 Ch. 82.
(*m*) *Baker* v. *Baker*, 6 H. L. Ca. 616.
(*n*) *Boden* v. *Boden*, 1907, 1 Ch. 132.
(*o*) *In re Howarth*, 1909, 1 Ch. 485.
(*p*) *In re Watkins' Settlement*, 1911, 1 Ch. 1.

Annuities,—when for life, and when perpetual.

An annuity given to A. simply is for the life of A. only, and an annuity given to A. expressly for his life, and afterwards to B. simply, is an annuity to A. for his life, and then to B. for his life (*q*); but an annuity may, of course, be so given as to be a perpetual (or fee simple) annuity (*r*).

Construction of legacies.

In deciding on all questions relative to legacies, where not charged on land, equity follows in general the rules of the civil law (as recognised and acted on in the old ecclesiastical Courts); but, as regards legacies charged on land, equity follows the rules of the old common law (which in all cases favoured the heir): Therefore, the Courts favour the vesting of legacies *not* charged on land,—whereby they become transmissible to the legal personal representatives of the legatee (*s*); but a legacy charged on land, even although vested, sinks, in general, for the benefit of the inheritance, in case the legatee dies before the period of payment (*t*). Also, legacies charged on land carry interest as from the date of the testator's death (*u*); but general legacies not so charged carry interest, in general, as from one year after the testator's death (*x*),—and that is so, even where the legacy is in lieu of the widow's dower (or free-bench (*y*)), or where it is given on a series of limitations (*z*).

(1) As to vesting.

(2) As to interest.

But a general legacy given in satisfaction of a debt carries interest as from the death (*a*),—as does also a general legacy to an infant child not otherwise provided for (*b*),—*Scil.*, being a legacy given to the infant on attaining twenty-one years of age but not any greater age (*c*): Also, the legacy of a fund which is "*segregated*" from the rest of the estate carries interest as from the testa-

(*q*) *Mansergh* v. *Campbell*, 25 Beav. 544.
(*r*) *Mansergh* v. *Campbell*, *supra*.
(*s*) *Harrison* v. *Foreman*, 5 Ves. 207.
(*t*) *Henty* v. *Wrey*, 21 Ch. D. 332.
(*u*) *Maxwell* v. *Wettenhall*, 2 P. Wms. 26.
(*x*) *Child* v. *Elsworth*, 2 De G. M. & G. 679.
(*y*) *Bignold* v. *Bignold*, 45 Ch. D. 496.
(*z*) *Whittaker* v. *Whittaker*, 21 Ch. Div. 657.
(*a*) *Clark* v. *Sewell*, 3 Atk. 99.
(*b*) *Woodroffe* v. *Moody*, 1895, 1 Ch. 101.
(*c*) *Abrahams* v. *Abrahams*, 1911, 1 Ch. 108.

tor's death (*d*). Also, if the legacy is of an annuity, it accrues from the death (*e*),—at least in general (*f*); and all specific legacies (*g*), and bequests of specific portions of a specific fund (*h*), carry interest as from the death. And as regards the rate of interest, that is four (and not three) per cent. in all cases (*i*).

Arrears of interest,—what recoverable.

Where the property of the testatrix out of which general legacies are payable is reversionary, and the executors (instead of selling the reversion) wait till the reversion falls in, the legatee will, in general, be entitled (*k*),—as will also any mortgagee of the legacy (*l*),—not merely to six years' arrears, but to all the arrears of interest from one year after the death of the testatrix. But when the legacy is payable only out of some reversionary fund,—*and is not* RECEIVABLE *until that reversion falls into possession*,—In such a case, the interest on the legacy only commences to accrue due when the reversion falls in (*m*). But no interest at all is, as a general rule, given on the arrears of an annuity (*n*).

Settled residue,—interest on, from the death.

Where the legacy is of the *residuary* personal estate, and it is settled on A. for life, with remainder over,—It appears, that the tenant for life is entitled to interest, the interest being calculated from the death,—and not (as in the case of a pecuniary legacy so settled) from one year after the death,—on "*the portion of the residue which is not required for the payment of the debts and funeral and testamentary expenses and legacies*" (*o*):

True residue, what is, and how ascertained?

That is to say, if £*x* (portion of the capital), with interest thereon at four per cent. for one year from the testator's death, will be sufficient to meet all the debts and funeral and testamentary expenses and all the legacies,

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(*d*) *Clemens* v. *Pearsall*, 1894, 1 Ch. 665.
(*e*) *Gibson* v. *Bott*, 7 Ves. 89.
(*f*) *Bignold* v. *Bignold*, *supra*.
(*g*) *Barrington* v. *Tristram*, 6 Ves. 345.
(*h*) *Mullins* v. *Smith*, 1 Dr. & Sm. 210.
(*i*) *Wood* v. *Bryant*, 2 Atk. 523.
(*k*) *Blachford* v. *Worsley*, 27 Ch. Div. 676.
(*l*) *Smith* v. *Hill*, 9 Ch. D. 143.
(*m*) *Earle* v. *Bellingham*, 24 Beav. 448.
(*n*) *Blogg* v. *Johnson*, L. R. 2 Ch. App. 225.
(*o*) *Allhusen* v. *Whittell*, L. R. 4 Eq. 295.

then the "*true residue*" at the death is the whole estate less £*x*; and the tenant for life (in respect of his title to the income) is entitled to the income of the whole estate less only the £*x*.

Hotchpot clause,—effect of, as regards interest.

Where a testator gives his residuary estate equally among his children (subject or not subject to a life interest in his widow),—and directs that, for the purpose of producing equality, any sums which he shall have advanced to any child shall be brought into hotchpot and accounted for as part of his (the child's) share,—In such a case, interest at the rate of four per cent. per annum is payable on the amount of the advances, the interest being computed as from the period when the estate is to be divided (being usually the date of the testator's widow's death (*p*)).

Legacy to wife,—subject to trust or condition to maintain children.

Where a man gives a legacy (or a share of residue) to his wife, *subject to her maintaining the children*,—That is a trust, and the Court enforces the due execution of the trust (*q*): That is to say, if the maintenance of the children is taken from the mother (on account of, say, her immoral life), the Court will give her part (and a sufficient part) of the legacy, and will keep (or apply) only the rest for the children: But while the children are with their mother, they shall have nothing,—save only an account (*r*).

Accretion to legacy,—

Where there is a legacy of shares, and there is an accretion thereto,—either by the payment of a bonus or otherwise,—The question, whether such accretion belongs as *capital* to the estate of the testator, or to the legatee of the shares; and the further question (where the accretion belongs to the legatee, and the legacy is given to one for life, with remainder to another), whether the accretion belongs wholly to the legatee for life as *income*, or is to be treated as *capital* added to the legacy,—These questions have been answered as follows:—Firstly, the accretion, if declared before the testator's death, will form part of

Whether it goes or not with the legacy.

(*p*) *Middleton* v. *Moore*, 1897, 2 Ch. 169; and (for an intestacy) *Ford* v. *Ford*, 1902, 2 Ch. 605.
(*q*) *In re G.* (*Infants*), 1899, 1 Ch. 719.
(*r*) *Costabadie* v. *Costabadie*, 6 Ha. 410.

his general estate (*s*), but if declared after the death, will go to the legatee (*t*); but where the accretion accrues *de die in diem*, an apportionment will be made, if part of the time during which the accrual has proceeded was in the life of the testator, and the residue of such time has been after his death (*u*): All which is in accordance, *semble*, with the Apportionment Act, 1870 (*x*),—*liabilities* incident to *rights* being also within that Act(*y*).

And when it is to be regarded as income or as capital.

And, Secondly, where (and so far as) the accretion goes to the legatee, then (as between the tenant for life and the remainderman) a bonus declared out of capital will be capital (*z*), and a bonus declared out of income (even accumulated income) will be income (*a*),—Excepting that, if the company has the power of declaring the bonus to be either capital or income, the company's decision (validly arrived at (*b*)) determines the question as between the tenant for life and the remainderman (*c*). But although a dividend, if paid in cash, will belong wholly to the tenant for life as income,—yet, if it is paid as to part in cash, and as to the other part by an issue of new shares, the tenant for life will not, in general, get the new shares as income (*d*); and the *liabilities* will be similarly distributed as between the tenant for life and the remainderman (*e*).

Apportionment,—none, where stocks or shares are sold *cum div.*

Where stocks or shares are held upon trust for A. for life, with remainder upon trust for (and to transfer the same to) B.,—and A. dies while a dividend is accruing; and the stocks or shares (instead of being transferred) are sold *cum div.* (*i.e.*, with the accruing dividend included), *and thereby a larger price is obtained for the stocks or shares*,—A.'s estate is not entitled to receive any part of that price in respect of the apportioned dividend accrued

(*s*) *Lock* v. *Venables*, 27 Beav. 598.
(*t*) *Mackinley* v. *Bates*, 31 Beav. 280.
(*u*) *Constable* v. *Constable*, 11 Ch. Div. 861.
(*x*) 33 & 34 Vict. c. 35; *In re Cox's Trust*, 9 Ch. Div. 159.
(*y*) *Rochester* (*Bp.*) v. *Le Fanu*, 1906, 2 Ch. 513.
(*z*) *Sproule* v. *Bouch*, 12 App. Ca. 385.
(*a*) *Armitage* v. *Garnett*, 1893, 3 Ch. 337.
(*b*) *Whitwham* v. *Piercy*, 1907, 1 Ch. 289.
(*c*) *In re Burton's Trust*, L. R. 5 Eq. 238.
(*d*) *Lovelace* v. *Anson*, 1907, 2 Ch. 424.
(*e*) *In re Poyzer*, *Landon* v. *Poyzer*, 1910, 2 Ch. 444.

before A.'s death (*f*),—*Scil.*, in the absence of special circumstances (*g*).

Infant's maintenance out of interest on legacy.

When a legacy is given to a child contingently on his or her attaining the age of twenty-one years, the income accruing on the investments representing the legacy is, by the Conveyancing Act, 1881, s. 43, available for the interim *maintenance* of the child during the contingency (*h*),—That is to say, *where such interest or income goes with the corpus or capital, assuming the contingency to happen* (*i*), and not otherwise (*k*); and any accumulations (unapplied) of such income will also go to the contingent legatee on the contingency happening (*l*),—but only on its happening (*m*),—And all these rules apply also where the legacy is payable out of a mixed fund (*n*).

Legacies given subject to a condition,—when the condition is *in terrorem* only and void, and when not?

Where a legacy (whether in the form of a pecuniary legacy (*o*) or of an annuity (*p*)) is given to A. B., subject to the condition that he shall not dispute the will, or shall not marry a particular person, or the like, the legacy is good, the condition being regarded as *in terrorem* only; and similarly, if the condition is otherwise utterly unreasonable (*q*). But if the legacy be *given over* to C. D., in case the primary legatee A. B. disputes the will,—or otherwise goes contrary to the specified condition,—then the gift over is good (*r*),—even although A. B. should not know of the condition until it is too late (*s*). And where a legacy or annuity is given to A. B., and (in case he marries with the consent of the trustees of the will) a further legacy or annuity (*t*), or an alternative larger legacy (*u*), the condition is good, and A. B. (if he fail

(*f*) *Freman* v. *Whitbread*, L. R. 1 Eq. 266.
(*g*) *Bulkeley* v. *Stephens*, 1896, 2 Ch. 241.
(*h*) *Holford* v. *Holford*, 1894, 3 Ch. 30.
(*i*) *Clements* v. *Pearsall*, 1894, 1 Ch. 665.
(*k*) *Shaw* v. *Cunliffe*, 4 Bro. C. C. 144.
(*l*) *Scott* v. *Scott*, 1902, 1 Ch. 918.
(*m*) *Bowlby* v. *Bowlby*, 1904, 2 Ch. 685.
(*n*) *Smart* v. *Taylor*, 1901, 2 Ch. 134.
(*o*) *Powell* v. *Morgan*, 2 Vern. 90.
(*p*) *Loyd* v. *Spillet*, 3 P. Wms. 344.
(*q*) *Rhodes* v. *Muswell Hill*, 29 Beav. 561.
(*r*) *Cleaver* v. *Spurling*, 2 P. Wms. 526.
(*s*) *In re Hodge's Legacy*, L. R. 16 Eq. 29.
(*t*) *Hampton* v. *Nourse*, 1899, 1 Ch. 63.
(*u*) *Gillett* v. *Wray*, 1 P. Wms. 284.

to comply with the condition) shall not have the further legacy or annuity or the increased legacy. But the Court will not suffer any abuse of such conditions,—nor (*e.g.*) may the trustees dishonestly or fraudulently refuse their consent, where their consent is the condition (*x*); and where the consent is once fairly given, it may not afterwards be withdrawn (*y*).

Conditions *subsequent*,—non-compliance with, effect of,—

Where a legacy (given subject to a condition *subsequent*) is settled on the legatee for life with remainder to her children, and the mother forfeits the legacy (by, *e.g.*, marrying without a due compliance with the condition), —The forfeiture involves also,—in the general case (*z*), but not invariably (*a*),—a forfeiture of the remainder to the children. And similarly, in the case of a *devise* (*b*).

also, where the condition becomes impossible,—effect.

But a condition *subsequent*, which becomes impossible in part, is discharged in whole (*c*); and where the impossibility arises through the act of the testator himself, the condition (whether *precedent* or *subsequent*) is discharged, and as well in the case of a devise as in the case of a bequest (*d*).

(*x*) *Clarke* v. *Parker*, 19 Ves. 1.
(*y*) *Ingall* v. *Brown*, 1904, 1 Ch. 120.
(*z*) *Whiting* v. *De Rutzen*, 1905, 1 Ch. 96.
(*a*) *In re Joseph*, 1908, 2 Ch. 507.
(*b*) *Davis* v. *Angell*, 4 De G. F. & J. 524.
(*c*) *Peyton* v. *Bury*, 2 P. Wms. 625.
(*d*) *Cooke* v. *Turner*, 15 Mee. & W. 727.

CHAPTER IX.

CONVERSION.

MONEY (by deed or will) directed to be laid out in the purchase of land, and land (by deed or will) directed to be sold and turned into money, are respectively considered (in equity) as being already converted,—by force of the direction simply and before they are converted in fact.

In considering this doctrine of conversion, we have to inquire,—(1) What words are sufficient for the conversion; (2) From what time the conversion takes place; (3) The general effect of the conversion; and (4) The result of a failure (total or partial) of the purposes for which the conversion was directed.

(1) *The Words sufficient for the Conversion.*—The direction to convert must be imperative,—and not merely optional. And, therefore, where A. gave £5,000 to B., in trust to lay it out in the purchase of lands, *or else* to put it out on good securities, for the separate use of his daughter H.,—and A. died in 1729, and H. died (without issue) in 1731, and her husband (as administrator) claimed the money as against the heir,—The money was decreed to the husband-administrator (*a*). The direction may, however, be *impliedly* imperative,—and will be so, when (*e.g.*) the trusts declared of the money are only adapted to land (*b*); and a direction to convert *on request* is (in the general case) imperative (*c*),—but not if it be on *joint* request (*d*).

The direction to convert must be imperative, whether (1) Express;

or (2) Implied, *e.g.*, where limitations are adapted only to land, or *vice versâ*.

(*a*) *Curling* v. *May*, 3 Atk. 255.
(*b*) *Earlom* v. *Saunders*, Amb. 241.
(*c*) *Re Tweedie and Miles*, 27 Ch. D. 315.
(*d*) *Re Gaylor's Settlement*, 9 Ha. 596.

A mere *power* to convert is, of course, not imperative (*e*),—wherefore only an *actual* conversion will, in such a case, be regarded (*f*); also where the power or direction to convert is for any reason void (*g*) or has ceased (*h*), there will be no conversion in equity,—even if there has been a conversion in fact.

Time from which conversion takes place.

(2) *The Time from which the Conversion takes place.*—Subject to the general principle, that the terms of each particular instrument must guide in the construction of it (*i*),—The rule is,—(1) That, in regard to a will, the conversion takes place as from the death of the testator; and (2) That, in regard to a deed, the conversion takes place from the date of execution (*k*), *notwithstanding that the trust for conversion* (contained in the *deed*) *is not to arise until after the settlor's death* (*l*). And note, that any delay in the actual conversion will not affect the respective rights which arise from the conversion in equity (or notional conversion (*m*)).

Rule inapplicable, when conversion is not the object.

But it is, of course, necessary in all cases,—and more especially in the case of a deed,—to be quite sure, that there is an intention to convert; and in the absence of such an intention, there will be no notional conversion at all. For example, where A. borrowed £300 from B. on a mortgage of A.'s fee simple estate, with a power of sale in the mortgagee; and (by the terms of the mortgage deed) *the surplus of the moneys to arise from the sale was to be paid to A., his executors or administrators*; and A. died, and *afterwards* B. sold the estate,—The Court held, that the surplus sale proceeds were real estate, and descended to the heir (*n*). But if the sale had been made *in the lifetime of A., the mortgagor*, the surplus would

In the case of mortgages,—difference according as sale before or after death of mortgagor.

(*e*) *Pitman* v. *Pitman*, 1892, 1 Ch. 279.
(*f*) *Challinor* v. *Sykes*, 1910, W. N. 81.
(*g*) *Walker* v. *Lever*, 1903, 1 Ch. 565.
(*h*) *Galloway* v. *Hope*, 1903, 1 Ch. 129.
(*i*) *Ward* v. *Arch*, 15 Sim. 389.
(*k*) *Griffith* v. *Ricketts*, 7 Hare, 311.
(*l*) *Clarke* v. *Franklin*, 4 K. & J. 257.
(*m*) *Doughty* v. *Bull*, 2 P. Wms. 320.
(*n*) *Wright* v. *Rose*, 2 Sim. & St. 323.

have formed part of A.'s actual personal estate,—and would (on his death) have gone to his next of kin (*o*),—and that although the word *heirs* should have occurred in the deed (*p*).

In case of land taken compulsorily,—complete contract, when, and when only?

Where lands are taken compulsorily under the provisions of the Lands Clauses Consolidation Act, 1845 (*q*), the mere "*notice to treat*" which is given by the company does not (as from the date thereof) operate as a conversion of the lands into money,—for such notice, without more, does not amount to a contract; But if the notice is duly followed up, and the price is afterwards ascertained,—whether by agreement of the parties, or (failing agreement) by valuation, arbitration, or verdict, as provided in the Act,—then, *and as from* (*but only as from*) *that date*, a conversion in equity is effected,—*Scil.*, because an enforceable contract has then, and only then, been arrived at (*r*): Which view is entirely consistent with the doctrine of equity in the case of ordinary contracts for sale,—For if an ordinary contract for the sale of lands is not enforceable, no conversion in equity will be effected by the contract (*s*),—*Secus*, if the contract is enforceable enough, but goes off (*after the death of the vendor*) through the sole default of the purchaser (*t*).

In case of leases containing option of purchase,—

As regards leases, conferring upon the lessee (or his assigns) an option to purchase the demised premises, these distinctions have been taken (as regards conversion), that is to say:—

(1) As between the real and personal representatives of the lessor,—(a) Option created previously to will.

Firstly, *As between the Lessor and his Real and Personal Representatives*:—In *Lawes* v. *Bennet* (*u*), where A., *before* making his will, made a lease to B. for seven years; and on the lease was endorsed an agreement that if B. should be minded to purchase the inheritance of the

(*o*) *Bourne* v. *Bourne*, 2 Hare, 35.
(*p*) *Chadwick* v. *Grange*, 1907, 2 Ch. 20.
(*q*) 8 Vict. c. 18.
(*r*) *Harding* v. *Metropolitan R. C.*, L. R. 7 Ch. App. 154.
(*s*) *Thomas* v. *Howell*, 34 Ch. Div. 166.
(*t*) *Broome* v. *Monck*, 10 Ves. 597.
(*u*) 1 Cox, 167.

premises for £3,000, A. would convey them to B. for that sum; and B. assigned the lease (and the benefit of that agreement) to C.; and A. died,—having by his will given all his *real* estate (by a *general* devise thereof) to D., and all his *personal* estate to D. and E.,—and B. on behalf of C. claimed the benefit of the agreement from D., who accordingly conveyed the premises to C. for the £3,000,—It was held, that the sum of £3,000 was part of the *personal* estate of A.,—*Scil.*, because the election once made referred back to the date of the original agreement,—although the rents and profits in the meantime went to D., the person entitled to the property as real estate (*x*). And the principle of the decision in *Lawes* v. *Bennet* is applicable also (as between the heir and the next of kin) where the lessor dies intestate,—and even although the option to purchase should not be exercisable until after the death (*y*). But, according to *Drant* v. *Vause* (*z*), where the testator makes a *specific devise* of the lands, the *specific* devisee will be entitled to receive the purchase-money in such a case when the option is exercised (*z*); and the rule is the same, where the specific devise and the option are (in effect) contemporaneous (*a*).

(b) Option created subsequently to will.

On the other hand, where a testator, *after* making his will devising his real estate (either specifically or generally) to B. and bequeathing his personal estate to C., grants a lease with an option of purchase, and that option is exercised after his death, the price payable on the exercise of the option will (in either case) go to C. (*b*),—equally as if the testator had merely sold in the first instance, and the completion of the sale was suspended.

(2) As between the real and personal representatives of the lessee.

Secondly, *As between the Lessee and his Real and Personal Representatives*:—It is to be observed, that the option, as being incidental to the lease, vests where the lease vests; and the "*assign*" of the lessee may exercise the

(*x*) *Townley* v. *Bedwell*, 14 Ves. 591.
(*y*) *Isaacs* v. *Reginald*, 1894, 3 Ch. 506.
(*z*) 1 Y. & C. C. C. 580.
(*a*) *Pyle* v. *Pyle*, 1895, 1 Ch. 724.
(*b*) *Weeding* v. *Weeding*, 1 J. & H. 424.

option, where the lessee himself does not exercise it; but, of course, the executor or administrator of the lessee is (for this purpose) an "*assign*" of the lessee: And in one case where the option was given to the lessee, and to "his executors, administrators, and assigns," and the lessee died intestate, and his administrator (who was also his heir-at-law) exercised the option and obtained a conveyance of the premises to himself in fee simple,—He was declared a trustee for the next of kin of the deceased lessee (*c*).

(3) As between the lessor and the lessee themselves.

Thirdly, *As between the Lessor and the Lessee themselves:*—Until the option is (in fact) exercised, there is merely the relation of landlord and tenant: Therefore, Firstly, the lessor is not a trustee of the demised premises for the lessee (conditionally on the option being exercised, and retrospectively); and, Secondly, the lessee is not entitled (retrospectively) to have any fire insurance moneys (received by the lessor) applied in part payment of the purchase-moneys payable on his exercise of the option,—at least, in the general case (*d*),—although he may occasionally be so entitled (*e*). But, seeing that the damage falls upon the purchaser,—the contract (once the option is exercised) becoming specifically enforceable,—Therefore, it is right, that the purchaser should have the insurance moneys, either paid to him,—or (if not paid to him) applied, at all events, in repairing the damage (*f*).

Perpetuities rule.—is applicable to option of purchase.

And note, that the option of purchase continues to be exerciseable, while the tenancy (under the lease) continues in fact,—although the original term of it may have expired (*g*). But, as regards all these options of purchase in leases,—as distinguished from options for a mere renewal of the lease (*h*),—They are (all of them) within the Rule of Perpetuities (*i*),—So that they cannot be given so as to be exerciseable beyond a life or lives in being and twenty-one years thereafter: However, for a

(*c*) *Re Adams and Kensington Vestry*, 17 Ch. Div. 394.
(*d*) *Edwards* v. *West*, 7 Ch Div. 858.
(*e*) *Reynard* v. *Arnold*, L. R. 10 Ch. App. 386.
(*f*) *In re Quicke's Trusts*, 1908, 1 Ch. 887.
(*g*) *Buckland* v. *Papillon*. L. R 2 Ch. App. 67.
(*h*) *Muller* v. *Trafford*, 1901, 1 Ch. 54.
(*i*) *Woodall* v. *Clifton*, 1905, 2 Ch. 257.

breach of the option (regarded as a contract), damages are always recoverable (*k*),—So that the lessor, rather than pay these damages, will ordinarily fulfil the option,—and if the lessor should have meanwhile died, his legal personal representative will probably do the same,—such legal personal representative being now able (under the Conveyancing Act, 1881, s. 4) to convey the fee simple, as well as to receive the option moneys.

Effects of conversion :
(a) As regards devolution on death.
(b) As regards curtesy and dower.
(c) As regards disposing by will.

(3) *As to the Effects of Conversion.*—Money directed to be turned into land descends to the heir (*l*), and land directed to be converted into money goes to the personal representatives (*m*). And accordingly, the money directed to be converted into land, where it belongs to a married woman, is liable to the husband's curtesy; and where it belongs to the husband, is now (under the Dower Act, 1833) liable to the widow's dower: Also (before the Wills Act, 1837) an infant under the age of twenty-one years might have made a will of his pure personal estate, but not of personal estate which had been directed to be laid out in land (*n*).

(d) As regards liability to death duties.

Where the conversion was by will, the land directed to be converted into money used to be subject to probate duty (*o*), and also to legacy duty (*p*),—equally as if it were actual money (*q*); and, of course, it is now subject to estate duty (which includes the old probate duty (*r*)).

(e) As regards escheat to the crown.

Money directed to be turned into land would not formerly have escheated to the crown (*s*),—*Scil.*, Because escheat was purely a *legal* incident; but such money now escheats, being *equitable* realty within the meaning of s. 4 of the Intestates' Estates Act, 1884 (*t*). Also, the land directed to be turned into money also now escheats,

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(*k*) *Worthing Corporation* v. *Heather*, 1906, 2 Ch. 532.
(*l*) *Scudamore* v. *Scudamore*, Prec. in Ch. 543.
(*m*) *Elliott* v. *Fisher*, 12 Sim. 505.
(*n*) *Earlom* v. *Saunders*, Amb. 241.
(*o*) *Att.-Gen.* v. *Hubbuck*, 13 Q. B. D. 275.
(*p*) *Att.-Gen.* v. *Holford*, 1 Pri. 426.
(*q*) *Att.-Gen.* v. *Johnson*, 1907, 2 K. B. 885.
(*r*) *In re Grimthorpe*, 1908, 2 Ch. 675.
(*s*) *Walker* v. *Denne*, 2 Ves. 169.
(*t*) 47 & 48 Vict. c. 71.

although formerly not (*u*). Also, as regards leaseholds directed to be turned into money, all these will, apparently, go as *bona vacantia* (*x*).

(4) Results of total or partial failure.

(4) *The Results of a Failure (total or partial) of the Purposes for which the Conversion is directed.*—In the case of *a total failure*,—the purposes for which the conversion was intended having totally failed *before or at the time when the will or deed came into operation*,—no conversion will take place at all; but the property will remain as it was,—or be "*at home*" (*y*): And, for these purposes, there is no difference between a deed and a will. But, in the case of a *partial failure*, it is necessary to distinguish between (1) *a will*, and (2) *a deed*:—

(i) Total failure.

(ii) Partial failure.

I. Cases under wills,—

(i) Land into money.

I. *Wills*—(i) *Land into Money.*—It was decided in *Ackroyd* v. *Smithson* (*z*), that when land was directed to be turned into money, the heir took the undisposed-of surplus of the land,—and that (to exclude the heir) there must have been an actual disposition in favour of another,—And this was because the testator's intention to convert the whole of his real estate into personalty, was *only in case all his residuary legatees should take*,—and not also *as between his own heir-at-law and his own next of kin.* But the rule of *Ackroyd* v. *Smithson* is inapplicable, where there is a sale under an order of the Court, and the heir-at-law consents to the sale (*a*),—and even where (being an infant) he does not consent (*b*),—*Scil.*, Because the sale being *properly* made, there is no equity to reconvert (*c*). Also, where the trustees of the will have a power of sale, and they do not exercise it, but the Court (in an administration action to which the trustees are defendants) orders a sale, that also is a lawful conversion of the land, and in that case also there is no reconversion of the surplus (*d*).

Doctrine does not apply to a sale by the Court,—

(*u*) *Taylor* v. *Haygarth*, 14 Sim. 8.
(*x*) *In re Higginson and Dean*, 1899, 1 Q. B. 325, on p. 329.
(*y*) *Clarke* v. *Franklin*, 4 K. & J. 257.
(*z*) 1 Bro. C. C. 503.
(*a*) *Steed* v. *Preece*, L. R. 18 Eq. 192.
(*b*) *Burgess* v. *Booth*, 1908, 2 Ch. 648.
(*c*) *Toovey* v. *Turner*, 1907, 1 Ch. 475.
(*d*) *Hyett* v. *Mekin*, 25 Ch. Div. 735; *In re Dodson*, 1908, 2 Ch. 638; *Fauntleroy* v. *Beebe*, 1911, 2 Ch. 257.

Except under special circumstances.

Nevertheless, under the Partition Act, 1868 (*e*), in the case of infants' lands (*f*),—and also in the case of married women's lands (*g*),—sold under an order of the Court for the sale thereof,—there is a reconversion. Also, under the Lands Clauses Consolidation Act, 1845 (*h*), where the land taken is the property either of a corporation, or of a tenant for life (or of any of the other *persons under disability* who are specified in s. 69 of the Act), there is a reconversion (*i*),—At least, in the general case, and apart from any special circumstances (*k*).

The land to be sold results to the heir,—as personal estate, if that is its actual condition.

(a) Where sale is necessary,—it results as money to the heir.

As regards the subsequent devolution after the death of the heir, of the real estate falling to him on such partial failure as aforesaid,—It was settled, in *Smith* v. *Claxton* (*l*), that where it was *necessary* to sell the land for the purposes of the trust, the surplus belonged to the heir as money,—and went therefore to the personal representative of such heir; and it was afterwards decided to make no difference, that the land is not sold during the lifetime of the heir, *provided it be sold eventually in the due execution of the trust* (*m*).

(b) Where sale is unnecessary, and is not made, or so far as not made,—it results as land to the heir.

(ii) Money into land.

Undisposed-of personalty results to personal representatives of testator as personalty.

I. *Wills.*—(ii) *Money into Land.*—It was decided, in *Cogan* v. *Stephens* (*n*), that where money was directed to be turned into land, the next of kin took the undisposed-of surplus of the money; and, by the cases which have been subsequently decided, it is now settled, that (in the case of such next of kin afterwards dying) the property devolves *according to its actual condition* at the time of the devolution,—*Scil.*, as personal estate, if that continues to be its actual condition; and as real estate, if (from any special cause) that should have become its actual condition (*o*). But any mere blending of the sale-proceeds of the real estate with the personal estate, will

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(*e*) 31 & 32 Vict. c. 40.
(*f*) *Foster* v. *Foster*, 1 Ch. D. 588; *Mildmay* v. *Quicke*, 6 Ch. Div. 553.
(*g*) *Wallace* v. *Greenwood*, 16 Ch. Div. 362.
(*h*) 8 Vict. c. 18.
(*i*) *Kelland* v. *Fulford*, 6 Ch. Div. 491.
(*k*) *Smith* v. *May*, 1900, 2 Ch. 474.
(*l*) 4 Mad. 492.
(*m*) *In re Richerson*, 1892, 1 Ch. 379.
(*n*) 1 Beav. 482, *n.*
(*o*) *Reynolds* v. *Godlee*, 1 John. 536; *In re Richerson, supra.*

not operate to convert the real estate into personal estate for the purpose of giving it to the next of kin (*p*). Also, any mere declaration, which purports to exclude the heir, will not suffice, although it should be ever so emphatic,—a mere intention to exclude the heir (*unless there is a gift over to some one else*) not sufficing (*q*): That is to say, no conversion (*as against the heir*) will arise, merely by the testator's declaring that the land is to be deemed personal estate and distributable accordingly (*r*); but the testator must go further, and declare his intention to be, that the realty shall be converted into personalty *for all purposes,—i.e.*, whether the *purposes of the will take effect or not* (*s*).

Blending of real and personal estates, —effect of.

Conversion for purposes of will, or out and out.

II. *Deeds.*—The rule is, that when realty is directed to be converted into personalty (*t*),—or personalty into realty (*u*),—for certain specified purposes, and a *part* of those purposes fails,—The property shall (to that extent) result to the settlor,—and through him (if it is land directed to be converted into money) to his personal representatives (*x*),—or (if it is money directed to be converted into land) to his heir (*y*); and the subsequent further devolution (if any) will, *semble*, depend upon the actual character of the property at the date of the further devolution (*z*).

II. Cases under deeds.

(*p*) *Jessop* v. *Watson*, 1 My. & K. 667.
(*q*) *Fitch* v. *Weber*, 6 Hare, 146.
(*r*) *In re Walker*, 1908, 2 Ch. 705.
(*s*) *Cruse* v. *Barley*, 3 P. Wms. 22.
(*t*) *Clarke* v. *Franklin*, 4 K. & J. 263.
(*u*) *Pulteney* v. *Darlington*, 1 Bro. Ch. Ca. 223.
(*x*) *Griffith* v. *Ricketts*, 7 Hare, 299.
(*y*) *Wheldale* v. *Partridge*, 8 Ves. 236.
(*z*) *Walter* v. *Maunde*, 19 Ves. 423.

CHAPTER X.

RECONVERSION.

RECONVERSION is the process whereby a prior *notional* conversion is annulled or discharged, and the notionally converted property is restored to its original actual unconverted quality; and this happens, either (1) By act of the parties, or (2) By operation of law.

I. By the act of the parties.

(1) By absolute owner.

I. *Reconversion by Act of the Parties.*—A sole owner entitled (absolutely and not defeasibly (*a*)) in fee simple in possession, may, of course, elect to take the property in whatever form he chooses; but the onus of proving the reconversion (even in that case) is on those who allege it (*b*). On the other hand, as regards co-tenants, the following distinction has been taken, namely,—That when the conversion is of money into land, any one undivided fee simple owner (entitled in possession) may reconvert without the concurrence of the others (*c*),—but not in the converse case of land into money (*d*); and the reason assigned for this diversity is, that the sale of an undivided share in realty is less marketable than the sale of the entirety (*e*).

(2) By owner of an undivided share.

(a) Of money to be converted into land.

(b) Of land to be converted into money.

(3) By remainderman,—to extent of his own interest only.

As regards Remaindermen,—They cannot reconvert, *so as to affect the interests of the prior tenants;* but remaindermen (even remote remaindermen (*f*)) are not, of course, prevented from declaring, that (*as between their*

(*a*) *Sisson* v. *Giles*, 3 De G. F. & J. 614.
(*b*) *Benson* v. *Benson*, 1 P. Wms. 130.
(*c*) *Scely* v. *Jago*, 1 P. Wms. 389.
(*d*) *Holloway* v. *Radcliffe*, 23 Beav. 163.
(*e*) *Mutlow* v. *Bigg*, 1 Ch. D. 385.
(*f*) *Cleveland* (*Duke*), *In re*, 1893, 3 Ch. 244.

own real and personal representatives) the remainder shall be real estate or shall be personal estate (*g*).

As regards Infants,—An infant does not, ordinarily, reconvert,—because the matter can usually wait,—But if the matter won't wait, then the Court will direct an inquiry, whether it is for the benefit of the infant to reconvert or not, and will order accordingly,—but without prejudice to the respective rights of the real and personal representatives of the infant, in case he should afterwards die under age (*h*). (4) By infants.

As regards Lunatics,—A lunatic cannot reconvert; but the committee of the lunatic may (with the sanction of the Court) do so,—In which latter case also, the respective rights of the real and personal representatives of the lunatic will be duly protected (*i*). (5) By lunatics.

As regards Married Women,—A married woman may, doubtless, reconvert, if she is an absolute owner: And as regards, firstly, the case of money into land,—a married woman, if entitled for her separate use, reconverts by ordinary deed; but if not entitled for her separate use, she reconverts by deed acknowledged (*k*),—the deed acknowledged being in lieu of the old fine (or separate examination) which used to be necessary for the purpose (*l*). And as regards, secondly, land into money,—a married woman (unless she is entitled for her separate use) reconverts by deed acknowledged; and she is able to do that, whether her estate is in possession (*m*), or is in reversion (*n*),—and although her estate should be merely an *interest* in the land (*o*). But, *nota bene*, her husband must, in all cases, concur in the deed acknowledged,—like he used to do in the old fine for which the deed (6) By married women. (a) Money into land. (b) Land into money.

(*g*) *Gillies* v. *Longlands*, 4 De G. & Sm. 372, 379.
(*h*) *Foster* v. *Foster*, 1 Ch. Div. 588.
(*i*) *Att.-Gen.* v. *Ailesbury* (*Marquis*), 12 App. Ca. 672.
(*k*) *Forbes* v. *Adams*, 9 Sim. 462.
(*l*) *Oldham* v. *Hughes*, 2 Atk. 453.
(*m*) *Briggs* v. *Chamberlain*, 11 Hare, 69.
(*n*) *Tuer* v. *Turner*, 20 Beav. 560.
(*o*) *Miller* v. *Collins*, 1896, 1 Ch. 573.

acknowledged has been substituted,—*Scil.*, where the married woman is not entitled for her separate use.

How election is shown.

It is clear, that an absolute owner of property, not under disability, may reconvert by any express declaration of his or her intention in that behalf; and as regards land into money, slight circumstances are deemed sufficient to raise the inference of a reconversion,—as keeping the land unsold for a time (*p*), or (on a lease of it) reserving the rent to the lessor his *heirs* and assigns (*q*). But as regards money into lands, only by the owner's actual receipt of the capital moneys from the trustees, would a reconversion be shown (*r*),—the mere receiving of the *income* of the money (though for a long time) not sufficing (*s*).

II. By operation of law. Concurrence of two requisites to reconversion necessary,—1st, property in person entitled whether it be real or personal; and 2nd, no declaration by him concerning it.

II. *Reconversion by Operation of Law.*—Where money has once been impressed with the quality of land, that impression will remain (for the benefit of the heir) until it is put an end to; and to put an end to it, two things are necessary (neither of which standing alone will suffice), that is to say:—Firstly, the money must have been in the hands (*i.e.*, in the actual possession) of some person who had in himself both the executors and the heirs (*t*); and, Secondly, that person must have died without making any declaration of his intention regarding it either way (*u*): That is to say, if money impressed with the quality of land, has come into the hands of B., the person solely entitled to it under the ultimate limitation in fee; and he dies without taking any specific notice of it, the heir-at-law of B. shall not have the money (*x*),—*Scil.*, because the money was "*at home*" in B.

Pulteney v. *Darlington*,—the money was doubly reconverted, having been twice over "at home."

Money impressed with real uses, *at home* in the

But, *nota bene*, if the money had not been so "*at home*" in B., but had "*stood out in a third person*," that

(*p*) *Mutlow* v. *Bigg*, 1 Ch. D. 355.
(*q*) *Forwell* v. *Lewis*, 30 Ch Div. 654.
(*r*) *Martin* v. *Trimmer*, 11 Ch. Div. 341.
(*s*) *Re Pedder's Settlement*, 5 De G. M. & G. 890.
(*t*) *Wheldale* v. *Partridge*, 8 Ves. 227, at p. 235.
(*u*) *Chichester* v. *Bickerstaff*, 2 Vern. 295.
(*x*) *Pulteney* v. *Darlington*, 1 Bro. C. C. 223; 7 Bro. P. C. 530.

would, *semble*, have made a difference; and it has been held (*y*), that there is no reconversion (*Scil.*, by operation of law simply), when any subsisting legal interest (*e.g.*, a legal jointure) is outstanding,—notwithstanding that all the successive limitations in the settlement have (subject only to such jointure) centred in one and the same person; but the money directed to be laid out in land and to be strictly settled will (in such a case) be held to remain impressed with the character of land,—and so go to the heir.

hands of the absolute owner, devolves as money; but not if any outstanding partial interest stands in the way.

And it is convenient here to say, that there is, in general, no equity for a reconversion,—either:

No equity for a reconversion, in general.

(1) As between the heir and the customary heir,—on an exchange (*z*); or
(2) As between the heir and the next of kin of a lunatic (*a*); or
(3) As between the heir *ex parte paternâ* and the heir *ex parte maternâ* (*b*); or
(4) As between the real and the personal representatives,—in the case of a conversion by statute (*c*).

But a man may, of course, always provide expressly to the contrary, by his will (*d*).

(*y*) *Walrond* v. *Rosslyn*, 11 Ch Div. 640.
(*z*) *Minet* v. *Leman*, 7 De G. M. & G. 340.
(*a*) *Re Tugwell*, 27 Ch. D. 329.
(*b*) *Ex parte Phillips*, 19 Ves. 118.
(*c*) *Frewen* v. *Frewen*, L. R. 10 Ch. App. 610, on p. 613.
(*d*) *In re Grimthorpe*, 1909, 2 Ch. 675.

CHAPTER XI.

ELECTION.

The *foundation* and the *characteristic effect* of the equitable doctrine.

ELECTION in equity arises, where there is a duality of gifts or of purported gifts,—one of the gifts being to A. of the donor's own property, and the other of them being to B. of the proper property of A.; and in the case of such a duality of gifts, there is an intention implied, that the gift to A. shall take effect, *only if A.* ELECTS *to permit the gift to B. to also take effect.* That is the *foundation* or principle of the doctrine of election; and the *characteristic* of that doctrine is, that, by an equitable arrangement, effect is given to the purported gift to B.

Two courses open to elect between,—

(1) Election under the instrument.

Supposing, for example, that A. by *will* or *deed* gives to B. property belonging to C., and by the *same* instrument gives other property belonging to himself to C., a Court of Equity will hold C. to be entitled to the gift made to him by A., only upon the *implied* condition that C. shall renounce his own property in favour of B.: And C. has two courses open to him (to choose between), That is to say,—either (1) To take under the instrument,—In which case B. will take C.'s property, and C. will take the property given to him by A.; or (2) To go against the instrument,—In which case, C. will forfeit or lose the gift made to him by A.,—*Scil., to the extent required to compensate B.* for the disappointment B. suffers through C.'s election against the instrument: That is to say, if A. (the testator) gives to B. a family estate belonging to C., worth £20,000 in the market, and by the same will gives to C. a legacy of £30,000 of his (A.'s) own property; and C. (unwilling to part with the family estate) elects against the instrument,—In such a case, C. will retain his family estate, and will also receive £10,000 (portion of his legacy of £30,000), leaving to B. £20,000

(2) Election against the instrument.

Compensation, and not forfeiture, is the rule,—upon an election against the instrument.

(other portion of the legacy of £30,000) to compensate him (B.) for the value of the estate of which he has been disappointed by C.'s election against the instrument (*a*). But, of course, the compensation is only payable, where C. elects against the will,—and not where he elects to take according to the will; and the compensation payable (where any is payable) *is only out of* (*and by way of charge on* (*b*)) *the other property given by the will, and is never in excess of that*,—a circumstance which distinguishes election from the case of a valid gift with a legal condition annexed to it (*c*).

There must be a fund from which compensation can be made,—*i.e.*, some property of donor's own.

The doctrine of election depending on the principle of compensation, it follows, that the doctrine is inapplicable, where there is no fund from which compensation can be made,—Or (speaking more simply) the doctrine of election only properly arises, where the donor (or purporting donor) really puts into his gifts (or purported gifts, or some or one of them) *some property that actually is his own*, at the same time that he affects to give away the property of others,—a point which comes out very clearly upon a contrast of the decisions in *Bristow* v. *Warde* and *Whistler* v. *Webster:* That is to say,—

(1) Where no property of testator's own is given,—effect;

In *Bristow* v. *Warde* (*d*) decided in 1794, it appeared that a father had the power of appointing certain stock among his children, and that the appointment funds in question were given to the children in default of appointment by the father; and it also appeared, that the father (by his will) appointed portion of the funds to his children (the proper appointees), and the remaining part thereof to X., Y., and Z. (who, as not being children, were improper appointees),—and *that the father did not* (*in or by his will*) *give any property of his own to the children*,—Upon these facts, the Court held, that the children might keep their appointed shares, and also take (as in default of appointment) the shares appointed to X., Y., and Z.,—and were not, in fact, bound to elect.

(*a*) *Gretton* v. *Hayward*, 1 Sw. 433.
(*b*) See *per* Jessel, M.R., in 5 Ch. D. 163, on pp. 173-4.
(*c*) *Robinson* v. *Wheelwright*, 21 Beav. 214.
(*d*) 2 Ves. 336.

(2) Where some property of testator's own is given, —the contrary effect.

On the other hand, in *Whistler* v. *Webster* (*e*), also decided in 1794, it appeared, that a father had the power of appointing certain moneys among his children, and that the appointment funds in question were given to his children in default of appointment by the father; and it also appeared, that the father (by his will) appointed portion of the funds to his children (the proper appointees), and the remaining part thereof to X., Y., and Z. (who, as not being children, were improper appointees),—and that *the father* (*in and by his will*) *gave also certain property of his own to the children*,—Upon these facts, the Court held, that the children were bound to elect, keeping (if they chose) their appointed shares and the other benefits given to them by the will, and (in that case) not interfering with the shares improperly appointed to X., Y., and Z.; or else taking (if they chose) the entire appointment fund to themselves, and (out of the other benefits given to them by the will) compensating X., Y., and Z., for the value of the shares improperly appointed to them. And, *nota bene*, when the appointees are put to their election, and some of them elect one way, and the others of them elect the other way, a nice intricacy arises, in the calculation of the compensation which is payable; but the compensation payable (whatever it is) is to be regarded as a benefit taken *under* the will,—and accordingly is to be valued in (*f*).

Ratification of voidable contract, distinguished from *election*.

Election arising only where there are two gifts, the one (real and effective) of the donor's own property, and the other (unreal and ineffective) of what is not the donor's property at all,—It is almost needless to say, that this doctrine of election in equity has nothing to do with the so-called election which is involved in the *ratification* of a voidable contract (*g*). Nor has it anything to do with those cases in which a testator makes two or more separate gifts of *his own* property to the same devisee or legatee, —In which latter case, if the one gift is beneficial and the other is onerous, the donee may take the gift which is beneficial and reject the gift which is onerous,—*Scil.*,

No election proper, in cases where the testator makes two bequests of his own property in the same instrument.

(*e*) 2 Ves. 367.
(*f*) *Booth* v. *Robinson*, 1906, 2 Ch. 321.
(*g*) *Wilder* v. *Pigott*, 22 Ch. Div. 263.

unless it appears by the will, that the testator's intention was, to make the acceptance of the burden a condition of the benefit (*h*): Which intention will be apparent enough when (*e.g.*) a testator devises his real estates collectively to A., and some of these estates are burdened with ancestral mortgages, and the others of them are free or comparatively free of such mortgages (*i*).

Election under powers.

Considerable difficulty attaches to election, in connection with special powers of appointment: And it appears, that where the appointment is made to a stranger to the power, and a benefit is conferred upon the person entitled in default of appointment, the latter will be put to his election; but that one who is merely an object of the power, and *not also the person entitled in default*, is not (in such a case) put to his election: That is to say,—Supposing, Firstly, that A. is the object of the power, and B. the person entitled in default, and X. the stranger to whom the purported appointment is made,—The appointment in favour of X. is clearly bad,—and therefore the property passes to B. as in default of appointment; but no property of A.'s has been given to X.: And supposing, Secondly, that A. was also the person entitled in default,—*i.e.*, if (in the case put) A. and B. were the same individual,—he (A.) would, if he received any benefit from the donee of the power, be put to his election, —not as A. (*the object of the power*), but as B. (*the person entitled in default of appointment*).

(1) As to person entitled in default of appointment, —a true case of election.

(2) As to person entitled under the power, —no case of election properly so called.

Absolute appointment, with directions modifying the appointment,—

Where there is an absolute appointment by will in favour of a proper object of the power, and the appointment is followed by words attempting to modify the interest so appointed *in a manner which the law will not allow* (*k*), the words of attempted modification will not be available to raise a case of election (*l*). But if the attempted modification is *such as the law will allow*, and amounts (in substance) to the creation of a trust, a case

(1) When such directions are invalid.

(*h*) *Freke* v. *Calmady*, 32 Ch. Div. 408.
(*i*) *Longford* v. *Kensington*, 1902, 1 Ch. 203.
(*k*) *Wollaston* v. *King*, L. R. 8 Eq. 165.
(*l*) *Woolridge* v. *Woolridge*, Johns. 63; *In re Oliver's Settlement*, *Evered* v. *Leigh*, 1905, 1 Ch. 191; *Cook* v. *Frederick*, 1909, 2 Ch. 450; affd. 1909, W. N. 226.

(2) When such directions are valid, and raise a case of election.

of election would, *semble*, arise: For example, where A. had a power to appoint certain hereditaments to the children of his first marriage, and such children were also entitled to these hereditaments in default of appointment; and (by his will) A. gave the hereditaments to a son of his by the first marriage, but purported to subject the devise to a charge in favour of his children by the second marriage (as well as in favour of his other children by the first marriage),—*and in and by his will he also devised certain property of his own to the son,* subject to the like charge,—The Court held, that the son was put to his election (*m*). Also, *nota bene*, there may even be a re-settlement of the appointed property, and the re-settlement may be contemporaneous with the appointment; and in such a case, the objects entitled under the re-settlement need not be (and usually are not) objects of the power at all,—but may be any objects whatsoever (*n*).

Re-settlement of the appointed share.

Ineffectual attempts to dispose of property by will,—examples of, raising or not election.

(a) Infancy.

(b) Coverture.

Where the disposing party was without capacity to dispose (as being, *e.g.*, an infant or a married woman), no case of election would, in the general case, have arisen: Therefore, where an infant purported to devise his real estate, and to give a legacy to his heir-at-law, the heir was not put to his election (*o*). Also, no case of election arose, where a married woman made a valid appointment by will to her husband, and bequeathed her personal estate (not being her separate estate) to another (*p*); and the like rule applied, where the will of the married woman was valid at the time of its execution, but afterwards became in part inoperative (*q*); and the husband's obtaining probate of the will would not (in such a case) have been construed into an assent on his part to the whole will being valid (*r*). And where property is given to a married woman by will, and the testator annexes a restraint on anticipation to the gift, the married woman (if still a married woman at the date of the death of the

(*m*) *White* v. *White*, 22 Ch. Div. 555.
(*n*) *Goldsmid* v. *Goldsmid*, 2 Ha. 187.
(*o*) *Hearle* v. *Greenbank*, 3 Atk. 695.
(*p*) *Rich* v. *Cockell*, 9 Ves. 369.
(*q*) *Blaiklock* v. *Grindle*, L. R. 7 Eq. 215.
(*r*) *Waller* v. *Atkinson*, 1899, 2 Ch. 1.

testator) will be exempt from the duty of electing (*s*),—even although she should afterwards become a widow (*t*).

(c) Wills before 1 Vict. c. 26.

Previous to the Wills Act, 1837, where a testator, by a will, *not properly attested* for the devise of freeholds but sufficient to pass personal estates, devised freehold estates away from his heir, and gave the heir a legacy,—the heir-at-law was not obliged to elect between the legacy and the freehold estate (*u*),—*Scil.*, unless where the legacy was given to him upon the *express* condition, that if he did not comply with the whole of the will, he should forfeit the legacy under it (*x*). But if (in such a case) the will was *properly attested* for the devise of freehold estates, and the testator merely attempted to thereby dispose of his *after-purchased lands*,—which, previous to the Wills Act, 1837, he could not effectually do,—then the heir (taking a legacy under the will) was bound to elect (*y*),—*Scil.*, because a will which is attested is a will (and can be looked at (*z*)).

(d) Election where Scotch lands are devised by English will;

Where a testator had real estate in England and also in Scotland, and he made an English will devising his lands in both countries to (in effect) his children; and the will not being in fact operative as regards the lands in Scotland, the eldest son became (strictly speaking) entitled as the testator's heir-at-law,—The Court held (*on the manifest intention*), that the eldest son was put to his election between the operative devises and bequests contained in the will and the real estate in Scotland which came to him by descent (*a*),—*Secus*, where no such manifest intention was apparent on the will (*b*). And as regards lands situate out of the jurisdiction generally, the like observations are applicable; and where a testator was possessed of real estates in England and also of real estates in the island of St. Kitts; and by a will *duly attested* for the real estates in England (but which was

or foreign lands, generally.

(*s*) *In re Vardon's Trusts*, 31 Ch. D. 275.
(*t*) *Haynes* v. *Foster*, 1901, 1 Ch. 361.
(*u*) *Sheddon* v. *Goodrich*, 8 Ves. 481.
(*x*) *Boughton* v. *Boughton*, 2 Ves. Sr. 12.
(*y*) *Schroder* v. *Schroder*, Kay, 578.
(*z*) *Pegler* v. *Gillatt*, 1905, 2 Ch. 70.
(*a*) *Orrell* v. *Orrell*, L. R. 6 Ch. App. 302.
(*b*) *Maxwell* v. *Maxwell*, 2 De G. M. & G. 705.

inoperative, by the law of St. Kitts, for the real estates in St. Kitts), he devised his real estates both in England and in St. Kitts to his heir-at-law for life,—The Court held, that the heir-at-law was put to his election (*c*).

(e) Election with reference to dower.

Where the Dower Act, 1833, did not apply,—That is, in the case of all widows who had been married on or before the 1st January, 1834,—A widow might by express words have been put to her election at law, between her dower and a gift conferred on her (*d*); and she might also have been put to her election in equity,—but only by the manifest intention of the donor to exclude her from her legal right to dower,—as where (*e.g.*) the will contained provisions which were *inconsistent* with the dower continuing (*e*). Conversely, a husband may be put to his election under the will of his wife, disposing of her property which is his in her right,—the will being (for this purpose) clear (*f*).

(f) Election in the case of *derivative* interests.

Where A. by his will gives to B. the fee simple property of C., and gives to C. property of his (A.'s) own, C. is, of course, bound to elect; And if C. elects against the will, and then dies leaving D. his heir-at-law (or universal devisee), D. is not also bound to elect, C.'s election sufficing: That is to say, D. is not also bound, in such a case, to elect (in respect of his derivative title under C.), even if he (D.) takes an original benefit under the will of A. (*g*). And, similarly, if a wife is entitled to lands in fee, and she elects against some will which purports to give away her lands to another (the will giving her, in lieu thereof, other benefits), and then she dies, and her husband (surviving her) becomes, by derivative title under his wife, entitled to his curtesy estate in the wife's lands,—he (the husband) will not also be bound to elect,—his wife's election sufficing: That is to say, the husband would not, in such a case, be bound to elect, even if he took also an original or independent benefit under

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(*c*) *Dewar* v. *Maitland*, L. R. 2 Eq. 834.
(*d*) *Nottley* v. *Palmer*, 2 Drew. 93.
(*e*) *Butcher* v. *Kemp*, 5 Mad. 61; *Thomas* v. *Howell*, 34 Ch. Div. 166.
(*f*) *Leacroft* v. *Harris*, 1909, 2 Ch. 206.
(*g*) *Grissell* v. *Swinhoe*, L. R. 7 Eq. 291.

the same will by which the wife was put to her election (*h*). On the other hand, where the devolution of interest happens *before* the original donee (called upon to elect) has elected, the person deriving title under him or her is bound to elect. In other words, the point of time which you have to consider, is the date of the death of the testator on whose will the question of election arises,—and you have to ascertain, who is, *at that date*, entitled to the property which the testator is purporting to give away; And if the person, *who is then entitled to that property*, takes a benefit under the will, he is bound to elect: That is to say,—recurring to the above case of A., B., C., and D.,—if you find, that C. died before A., —and so never took the benefit intended for him under A.'s will (nor ever was called upon to elect) at all; and if you also find, that D. is the person who, *at the date of the death of* A., is entitled to the estate (late of C.) which A. purported to devise to B.,—D. is bound to elect, so as to compensate B. (*i*). And the Court says (in effect), that whether C. survives A., and elects against the will,—or C. predeceases A., and D. (becoming entitled under C.) elects against the will,—in either of these two cases, the benefit given by the will of A., to C. in the first case, or to D. in the second case, is saddled with a *charge* in favour of B., for the full amount of the market value of the estate of C. (or late of C.) which was given by the will of A. to B. (*k*),—the charge (as above mentioned) never exceeding (in amount) the value of the property which is charged with it; and if C. elect (or if D. elect) against the will of A., and deny the validity of such a charge, he will (usually) have to pay also the costs of the action to enforce the charge (*l*).

The relief in equity,—is by means of a *charge*.

Where, in a post-nuptial settlement, there is a covenant by the husband (and wife) to settle all the wife's personal property which shall fall into possession during the coverture,—and part falls in, and is settled; and other parts afterwards fall in, but the wife refuses to allow these also to be settled,—The Court says, that the wife

Election in the case of covenants to settle wife's property.

(*h*) *Cavan* v. *Pulteney*, 3 Ves. 384.
(*i*) *Cooper* v. *Cooper*, L. R. 7 H. L. 53.
(*k*) *Pickersgill* v. *Rodger*, 5 Ch. D. 163, on p. 173.
(*l*) *Rogers* v. *Jones*, 7 Ch. D. 315.

is bound to elect (as between the settled part and the unsettled parts (*m*)); and the like rule is applicable to the wife's reversionary interests in personal property (*n*), —and also to her real estates in fee simple (*o*), or in fee tail (*p*).

The intention of the testator is to be sought for,—and it must appear on the face of the will itself.

It being necessary, in order to raise a case of election, that a clear intention to dispose of that which is not the donor's own should appear *on the instrument itself*,—therefore, if the words used are capable of being otherwise satisfied, no case of election will arise (*q*); and parol evidence is not admissible for the purpose of raising a case of election (*r*).

Modes of electing: (1) Married women,—they elect as to *land* by deed acknowledged; and as to *money*, by direction of Court on inquiry.

With regard to the mode of signifying one's election,—Married women elect as to real estate by deed acknowledged,—the husband concurring, of course, in the deed; and they elect as to personal estate also by deed acknowledged (*Scil.*, where Malins' Act is applicable (*s*)), and the husband again concurring: But where the Court has seisin of the matter, an inquiry may be directed, as to which of the two interests is the more beneficial for the married woman to take,—and she will then elect according to the result of the inquiry (*t*). And, of course, as regards their *separate estates*, married women (being of full age) elect like any male adult,—*Scil.*, where no restraint on anticipation is annexed to their separate estate; but where such a restraint is annexed, if (under the circumstances) the married woman must elect, she could only do so with the aid of the Court, and by virtue of the provision contained in s. 39 of the Conveyancing Act, 1881. And although it seems, that a married woman may elect by conduct,—being conduct whereby she is estopped from denying that she has elected (*u*); yet she cannot be so estopped, where the separate estate is subject to the re-

(*m*) *Anderson* v. *Abbott*, 23 Beav. 457.
(*n*) *Codrington* v. *Codrington*, L. R. 7 H. L. 854.
(*o*) *Brown* v. *Brown*, L. R. 2 Eq. 481.
(*p*) *Green* v. *Green*, 2 Mer. 86.
(*q*) *Shuttleworth* v. *Greaves*, 4 My. & Cr. 35.
(*r*) *Dummer* v. *Pitcher*, 2 My. & K. 262.
(*s*) 20 & 21 Vict. c. 57.
(*t*) *Wilder* v. *Piggott*, 22 Ch. Div. 263.
(*u*) *Barrow* v. *Barrow*, 4 K. & J. 409.

straint on anticipation (*x*),—*Scil.*, while that restraint continues:

(2) Infants, —they wait till of age; or else elect by direction of Court on inquiry.

(3) Lunatics, —they elect by direction of Court on inquiry.

As regards infants, the practice is not quite uniform, being adapted to the necessities of the case: That is to say, the period of election may be deferred, until the infant comes of age; or there may be a reference to inquire what is most beneficial for the infant, and the Court will elect for him upon the result of that inquiry. And as regards lunatics, the practice is to refer the matter to a Master in Lunacy, to report as to what is best for the lunatic; and the Court elects on the report (*y*); but the Court may, in a proper case, defer the matter:

Privileges of persons compelled to elect.

What is deemed an election,—by conduct.

Persons compelled to elect are entitled previously to ascertain the relative values of the two properties between which they are called upon to elect; and an election made under a mistake of fact will not be binding (*z*). Also, in all cases of election by conduct,—the question as to whether there has been an election or not, must be determined (like any other question of fact) upon the circumstances of each particular case,—and there can, of course, be no election without the intention of electing (*a*).

Election against instrument,—where no election in fact.

Length of time may exclude right to question election.

And when a time is limited for the election being made, a person who does not elect within the time will be considered to have elected against the instrument (*b*). On the other hand, where no time is limited, the Court will not readily hold a man to be concluded by the mere lapse of time,—so that if he merely continues in his former enjoyment, he will not be taken to have elected (*c*),—unless where (by reason of his delay) he is estopped (other considerations having in the meantime arisen) from disturbing the enjoyment of others (*d*).

(*x*) *Bateman* v. *Faber*, 1897, 2 Ch. 223.
(*y*) *Re Sefton* (*Earl*), 1898, 2 Ch. 378.
(*z*) *Kidney* v. *Coussmaker*, 12 Ves. 136.
(*a*) *Dillon* v. *Parker*, 1 Swanst. 380, 387.
(*b*) *Fytche* v. *Fytche*, L. R. 7 Eq. 494.
(*c*) *Mutlow* v. *Bigg*, 1 Ch. D. 385.
(*d*) *Tibbits* v. *Tibbits*, 19 Ves. 663.

CHAPTER XII.

PERFORMANCE.

WHERE a person covenants to do an act, and he does some other act of a kind to be available for the performance of his covenant, he is presumed to have had the intention of performing the covenant,—*Scil.*, because "Equity imputes an intention to fulfil an obligation."

The cases in which questions of performance arise, range themselves under two classes, viz., (1) Where there is a covenant to purchase and settle lands, and a purchase is in fact made; and (2) Where there is a covenant to *leave* personalty to A., and the covenantor dies intestate, and property thereby comes in fact to A.

I. Covenant to purchase lands,—*Lechmere* v. *Carlisle*(*Earl*), decision in;

I. In *Lechmere* v. *Earl of Carlisle* (*a*),—Where Lord L. (upon his marriage with Lady E.) covenanted to lay out,—within one year after his marriage, and with the consent of the trustees,—£30,000 in the purchase of *freehold lands in possession*, in the south part of Great Britain, to be settled on himself for life, with remainder (for so much as would amount to £800 a year) to his wife for her jointure, with remainder to the first and other sons in tail-male and with the ultimate remainder to himself in fee simple; and it appeared, that Lord L. was seised of certain lands in fee at the date of the marriage; and that *after* the marriage (but without the consent of the trustees) he purchased other *estates in fee simple* of about £500 per annum (together with certain estates *for lives and reversionary estates in fee simple* expectant on lives) and *contracted* for the purchase of

(*a*) 3 P. Wms. 211; Ca. t. Talb. 80.

other estates *in fee simple in possession;* and he then died intestate,—without issue, and without having made a settlement of any of these estates; and the plaintiff was his heir-at-law, and (as such) claimed specific performance of the covenant,—that is to say, to have the £30,000 laid out as agreed,—It was held, that the *freehold* lands purchased and contracted to be purchased *in fee simple in possession* AFTER the marriage (though with but part of the £30,000) should go in part performance of the covenant; but that the estate purchased *previously to the marriage* (*the leaseholds for lives,* and *the reversions in fee expectant on the estates for lives*) *should not go in part performance of the covenant;* wherefore these four points were established by that decision, namely:— and deductions from.

(1) Where the lands purchased are of less value than the lands covenanted to be purchased and settled, they will be considered as purchased in *part* performance of the covenant; (1) Performance may be good *pro tanto.*

(2) Where the covenant points to a *future* purchase of lands, lands of which the covenantor is already seised at the time of the covenant are not to be taken in part performance of it; (2) Previously purchased lands do not count.

(3) Property of a different nature from that covenanted to be purchased by the covenantor is not available as a performance: And, (3) Lands purchased, if unsuitable, do not count.

(4) The absence of the consent of the trustees will not prevent the performance; and, *nota bene,* if the covenant had been *to pay the money to the trustees, to be laid out by* THEM in the purchase of the lands, that also would have been immaterial (*b*). (4) Trustees' consent to purchase,—want of, is immaterial.

A covenant to settle land (being, in general, a mere specialty debt) will not create a lien on the lands afterwards purchased,—so that it will not affect a purchaser (or mortgagee) of the lands, even with notice (*c*); but the covenant is specifically enforceable against all volun- Covenant to settle, does not create a lien on lands purchased.

(*b*) *Sowden* v. *Sowden*, 1 Bro. C. C. 582.
(*c*) *Deacon* v. *Smith*, 3 Atk. 323.

teers (*d*); and if the covenant was to acquire and settle specified lands,—that would (or might) create a lien (*e*).

Covenants to settle after-acquired property, construction of.

As regards the after-acquired property of the wife, and the covenant to settle same, which is (not unusually) inserted in marriage settlements,—It appears, that these covenants, unless the words thereof are clear to the contrary, operate only "*during the coverture*" when the wife is the survivor,—although they may operate also beyond the coverture when the husband is the survivor (*f*),—the phrase "*during the coverture*" intending, in general, during all the period of the husband's possible interference (*g*). The after-acquired property may come from the husband himself (*h*), or from any other person,—but extends not (in general) to include the wife's fee-tail estates in remainder (*i*),—nor her contingent interests in personal estate (*k*),—nor her general powers of appointment (*l*),—nor any interests of hers which are a mere *spes successionis* (*m*), or which are given to her for her life only (*n*),—nor any jewellery given to her, or property purchased by her with her savings (*o*),—and, of course, property which the wife is already at the date of the marriage entitled to, is not *after*-acquired property, or within such a covenant (*p*).

II. Covenant to pay or leave by will, and share under the Statute of Distributions.

II. In the case of the covenant of a husband to *leave* his wife a gross sum of money,—If, through his death intestate, the wife becomes in fact entitled (under the Statutes of Distribution) to a portion of his personal property,—Is such distributive share a performance of the

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(*d*) *Wellesley* v. *Wellesley*, 4 My. & Cr. 561.
(*e*) *Montagu* v. *Sandwich*, 32 Ch. D. 525.
(*f*) *Coling* v. *Haden*, 1898, 2 Ch. 220.
(*g*) *Davenport* v. *Marshall*, 1902, 1 Ch. 82.
(*h*) *Ellis* v. *Ellis*, 1909, 1 Ch. 618; and *Plumtree's Marriage Settlement*, 1910, 1 Ch. 609.
(*i*) *Nott* v. *Dunsany*, 1906, 1 Ch. 578.
(*k*) *Atcherley* v. *Du Moulin*, 2 K. & J. 186.
(*l*) *Tremayne* v. *Rashleigh*, 1908, 1 Ch. 681.
(*m*) *Allcard* v. *Walker*, 1896, 2 Ch. 369.
(*n*) *Gregory* v. *Dowding*, 1904, 1 Ch. 441.
(*o*) *Bloxam* v. *Clutterbuck*, 1905, 1 Ch. 200.
(*p*) *Bland* v. *Perkins*, 1905, 1 Ch. 4.

covenant or not? The answer is,—It is; and it is not,—according to the following distinctions, that is to say:—

(1) When husband's death occurs at or before time when the obligation accrues, distributive share a performance.

Firstly, If the death of the husband occurs at the time when, or before the time when, the obligation ought to be performed,—The widow's distributive share will be taken as a performance of the covenant,—*pro tanto* or *in toto*, according as that share is less than, or equal to or greater than, the sum due under the covenant (*q*),—*Scil.*, because the covenant is to be taken as *not broken during the life of the husband;* and there being *no breach of the covenant,* there is *no* DEBT.

(2) Where husband's death occurs after obligation accrues, distributive share not a performance.

But, Secondly, If the death of the husband occurs *after* the obligation under the covenant has arisen,—or (in other words) *after a breach of the covenant*,—the widow's distributive share is not a performance of the obligation; and, where the husband's covenant was, to pay to his wife *within two years* after the marriage, and he lived *after the two years*,—and then died intestate, leaving a larger sum (than what he covenanted to pay) to devolve upon his widow as her distributive share,—The widow was held entitled, both to the money under the covenant and to her distributive share under the statute (*r*).

Covenant,—discharge of; also, suspension of.

And upon this sort of covenants, these two further points should be noted,—Firstly, that the covenant may have been (in effect) discharged altogether,—*Scil.*, by the events which have happened since the marriage (*s*); and, Secondly, that although, where a man marries his creditor, the marriage operates to discharge the debt, still that rule is not (and never was) applicable to the covenant of a husband to pay (or leave) to his widow at his death a certain sum of money (*t*).

(*q*) *Blandy* v. *Widmore*, 1 P. Wms. 323.
(*r*) *Oliver* v. *Brickland*, 3 Atk. 420.
(*s*) *Jones* v. *How*, 7 Ha. 267; and see *Plumtree's Marriage Settlement*, 1910, 1 Ch. 609.
(*t*) *Smith* v. *Stafford*, Hob. 216; *Cage* v. *Acton*, 1 Ld. Raym. 515.

CHAPTER XIII.

SATISFACTION.

SATISFACTION (like performance) supposes intention, but (in satisfaction) the thing done is something different from the thing covenanted to be done,—whereas (in performance) the *identical* act which the party contracted to do is considered to have been done.

The cases on satisfaction group themselves under three heads, namely,—(1) Satisfaction of Debts by Legacies; (2) Satisfaction of Legacies by Legacies; and (3) Satisfaction of Legacies by Portions,—and, conversely, of Portions by Legacies.

I. Of debts by legacies.

I. *Satisfaction of Debts by Legacies.*—In this group of cases, the general rule is, "that if one, being indebted to another in a sum of money, does (by his will) give him a sum of money as great as, or greater than, the debt, *without taking any notice at all of the debt,* this shall be in satisfaction of the debt" (*a*),—because "*Debitor non presumitur donare.*"

But the presumption is not favoured by the Court: Therefore,—

(1) Legacy less than debt.

(1) If the legacy be less than the debt, it is not a satisfaction, even *pro tanto* (*b*). But

(2) Legacy equal to, or greater than, debt.

(2) If the legacy be given *simpliciter*, and be *equal* to the debt (*c*),—or if the legacy be given *simpliciter*, and be *greater* than the debt (*d*),—In either of these cases, the legacy will be taken as

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(*a*) *Talbot* v. *Shrewsbury*, Prec. Ch. 394.
(*b*) *Eastwood* v. *Vinke*, 2 P. Wms. 617.
(*c*) *Haynes* v. *Mico*, 2 Bro. C. C. 130.
(*d*) *Talbot* v. *Shrewsbury*, *supra*.

a satisfaction of the debt,—So that if (*e.g.*) the debt is afterwards discharged by payment before the testator's death, the legacy also may have ceased to be payable (*e*).

(3) No presumption of satisfaction will be raised where the debt of the testator was contracted *subsequently* to (*f*),—or contemporaneously with (*g*), —the making of the will,—*Scil.*, because the testator could have had no *intention* of satisfaction in such a case. (3) Debt contracted after will.

(4) If there is an express direction in the will, for the payment of the *debts* AND the *legacies*, both the debt and the legacy will be payable,— according to the rule in *Chancey's case* (*h*),— a rule which was (at one time) supposed not to apply where the direction was to pay the debts *alone* (*i*); but a mere direction to pay the debts is now of itself sufficient (*k*). (4) Circumstances rebutting the presumption. (a) Direction in will for payment of debts *and* legacies,— or direction to pay debts alone.

(4a) If a time is expressly fixed for the payment of the legacy, and that is different from the time when the debt is demandable, both the debt and the legacy will be payable (*l*),—notwithstanding the fact, that the legacy carries interest from the death (*m*): And (b) Time for payment of legacy differing from that of debt.

(5) Where the legacy is of residue,—or is otherwise contingent, it will not be a satisfaction of the debt (*n*),—even of a debt due to a child (*o*),— and this is because a gift of residue is necessarily uncertain; and a bequest of residue *to a wife even* will not be a satisfaction of a debt due to her (*p*). (c) Contingent legacy.

II. *Satisfaction of Legacies by Legacies.*—Firstly, when legacies of quantity in the *same* instrument II. Satisfaction of legacies by subsequent legacies.

(*e*) *Gillings* v. *Fletcher*, 38 Ch. Div. 373.
(*f*) *Cranmer's case*, 2 Salk. 508.
(*g*) *Wiggins* v. *Horlock*, 39 Ch. Div. 142.
(*h*) 1 P. Wms. 408.
(*i*) *Wiggins* v. *Horlock*, 39 Ch. Div. 142.
(*k*) *Bradshaw* v. *Huish*, 43 Ch. Div. 260.
(*l*) *Clark* v. *Sewell*, 3 Atk. 96.
(*m*) *Calham* v. *Smith*, 1895, 1 Ch. 516; *Ray* v. *Grant*, 1906, 1 Ch. 667.
(*n*) *Barrett* v. *Beckford*, 1 Ves. Sr. 519.
(*o*) *Crichton* v. *Crichton*, 1895, 2 Ch. 853.
(*p*) *Bartlett* v. *Gillard*, 3 Russ. 149.

(1) Under the same instrument:

(2) Under different instruments.

(whether a will or a codicil) are given to the same person *simpliciter*, and are of *equal* amounts, one only will be good (*q*); but if the legacies are of *unequal* amounts, they will be cumulative (*r*). And, Secondly, where legacies of quantity are given *simpliciter*, by *different* instruments, to the same person, the legatee shall have both or all the legacies; and (in such a case) it is immaterial, whether the subsequent legacy differs or not in amount from the prior one (*s*). Also, note, that a *donatio mortis causâ* of £2,000 is not satisfied by a subsequent legacy of £2,000 (*t*). But if the legacies are not given *simpliciter*, but the motive of the gifts is expressed in each, and the *same motive* is expressed in each, and the *same sum* is given, the Court considers, that the testator did not (by the subsequent instrument) mean another gift, but only a repetition of the former gift (*u*), —*Scil.*, where the double coincidence occurs, of the *same motive and the same sum* in both instruments. But if (in either instrument) there be *no motive* expressed, or a *different* motive is expressed in each (*x*); or if the *same motive* be expressed in the different instruments, but the *sums* are not the same (*y*),—In either or all of these cases, the legacies will be cumulative,—*Scil.*, unless where the second instrument expressly refers to the first,—or either by intrinsic evidence (*z*), or by extrinsic evidence (*a*), is shown to be a mere copy (or duplicate) of the first.

Extrinsic evidence,—when admissible and when not.

And, on the question of the admissibility of extrinsic evidence in such a case, the two following rules appear to hold good, namely:—

(1) That where the Court itself raises the presumption against double legacies, such evidence is admissible,—to

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(*q*) *Greenwood* v. *Greenwood*, 1 Bro. C. C. 31, *n*.
(*r*) *Yockney* v. *Hansard*, 3 Hare, 620.
(*s*) *Roch* v. *Callen*, 6 Hare, 531.
(*t*) *Hudson* v. *Spencer*, 1910, 2 Ch. 285.
(*u*) *Benyon* v. *Benyon*, 17 Ves. 34.
(*x*) *Ridges* v. *Morrison*, 1 Bro. C. C. 388.
(*y*) *Hurst* v. *Beach*, 5 Mad. 352.
(*z*) *Currie* v. *Pye*, 17 Ves. 462.
(*a*) *Whyte* v. *Whyte*, L. R. 17 Eq. 50.

show that the testator intended the legatee to take both; But

(2) That where the Court does not raise that contrary presumption, no such evidence is admissible,—to show that the testator intended the legatee to take in fact one only.

III. Satisfaction of legacy by portion, and *vice versâ*.

III. *Satisfaction of Legacies by* PORTIONS,—*and conversely*.—In this group of cases, the general rule (*b*) is,—That where a parent, whether out of his own property or under a special power of appointment vested in him (*c*), gives a legacy to a child (not stating the purpose with reference to which he gives it), the Court understands him as giving a PORTION; and therefore, if the father subsequently advances a portion on the marriage of the child, the portion is presumed to be a satisfaction of the legacy (either *pro tanto* or *in toto*),—*Scil.*, Because the Court "*leans against double portions*":

General rule,—one only payable.

Rule does not apply as to legacies and portions to a stranger,—including (for this purpose) an illegitimate child.

But as regards these double provisions, the doctrine of satisfaction applies, only where the parental relation (or its equivalent) exists; and if therefore a person gives a legacy to a stranger, and then makes a settlement on that stranger,—or first agrees to make a settlement on the stranger, and then bequeaths a legacy to him,—the stranger (usually an illegitimate child) is entitled (in either case) to claim both (*d*).

Legacy to mixed class of children and strangers,—satisfaction of children's shares,—effect of.

But if a legacy (say, of residue) is given to be divided equally among children and strangers, and the children's legacies are afterwards satisfied by portions, and the strangers (including the illegitimate children) also receive advances,—These last-mentioned advances would not operate (it is true) as a satisfaction of the strangers' shares of the residue; but neither would these latter shares be increased by the satisfaction of the children's shares (*e*). Also, even in the case of strangers (including illegiti-

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(*b*) *Pollock* v. *Worrall*, 28 Ch. Div. 552.
(*c*) *Biddulph* v. *Peel*, 1911, 2 Ch. 165.
(*d*) *Ex parte Pye*, 18 Ves. 140.
(*e*) *Pumfrey* v. *Fryer*, 1906, 2 Ch. 230.

Legacy for a purpose,—effect, where advancement for same purpose.

mate children), if the legacy be given for a particular express purpose, and the testator advances money for the *same* purpose, that will be an ademption of the legacy (*f*), —but not if the purpose of the legacy is not specified, although the purpose of the advancement is (*g*).

The presumption against double portions is founded on good sense.

The presumption applies, where the donor has placed himself *in loco parentis* to the donee.

And, in passing, it may be observed, that the presumption against double portions,—although it has been sometimes characterised as a hard and artificial rule, and although it also sometimes operates to produce inconvenient results,—is really founded, upon the whole, on good sense and justice (*h*); and that presumption applies, if the donor has placed himself "*in loco parentis*" to the legatee (*i*).

Leaning against double portions.

Same principles applicable, when settlement comes before will,—at least in general,—

Owing to the leaning of the Court against double portions, the presumption of satisfaction will not be repelled by slight circumstances of difference between the legacy and the portion,—although material differences may count. Therefore, in *Thynne* v. *Glengall* (*k*), where a father, on the marriage of his daughter, agreed to give her a portion of £100,000 Consols,—and made an actual transfer of one-third thereof to the *trustees* of the marriage settlement, and gave them his bond for the transfer of the remainder on his death; and the stock was to be held in trust for the daughter's separate use for life, and (after her death) for the children *of the marriage*, as the *husband and wife* should jointly appoint; and it appeared, that afterwards (by his will) the father gave to the trustees a moiety of the *residue* of his personal estate, in trust for the daughter's separate use for life, with remainder for *her* children generally as *she* should by deed or will appoint,—The Court held, that the moiety of the residue given by the will was a satisfaction of the sum of stock not actually transferred,—being the portion thereof secured by the bond.

(*f*) *Corbett* v. *Lord Cobham*, 1903, 2 Ch. 326.
(*g*) *In re Fletcher*, 38 Ch. D. 373.
(*h*) *Lawes* v. *Lawes*, 20 Ch. D. 81.
(*i*) *Powys* v. *Mansfield*, 3 My. & Cr. 359.
(*k*) 2 H. L. Ca. 131.

Excepting that, where settlement comes first, persons taking under it are *quasi-purchasers*,—with right to elect between the settlement and the will.

It is to be observed, however, that where the settlement precedes the will, and the trusts are dissimilar, the persons entitled under the settlement are *quasi-purchasers*,—and therefore cannot (upon any presumed intention of the testator) be deprived (*against their will*) of their rights under the settlement,—and (at the utmost) can only be put to elect, whether to take under the will or under the settlement (*l*); and (for the purpose of such election) an inquiry will be directed. But it is otherwise, when the settlement is made *subsequently* to the will,—So that, where a father bequeathed his residuary estate (which comprised his business of a bookseller) equally between his two sons and his three daughters; and subsequently he assigned his business to the two sons,—The assignment was held to be a satisfaction of the bequest to the sons (*m*). Also, where a person *in loco parentis* gave a bond to A. for the payment to him of £10,000 on a day therein specified; and afterwards (only a few weeks before the day) he took A. into partnership with him,—That was held to be a satisfaction of the bond (*n*),—although the thing substituted was only remotely *ejusdem generis* (*o*).

Appointment under special power,—when a satisfaction.

Where the donee of a special power of appointment appoints (by will) the whole fund equally among his children,—and afterwards appoints (by deed) a portion of the fund to one of such children exclusively,—the rule against double portions will not, in general, apply,—So that the last child appointee (by deed) will share also and equally with the whole class of children,—*Scil.*, unless the appointment (by deed) has been, in fact, a mere anticipation of the share appointed by the will, *and has been accepted as such by the appointee* (*p*). And generally, in all cases of alleged satisfaction, the surrounding circumstances (including the true construction of the will) must be considered, and the intention fairly gathered therefrom (*q*).

The testator's intention, although not express, but implied only, may exclude satisfaction.

(*l*) *Chichester* v. *Coventry*, L. R. 2 H. L. 87.
(*m*) *Vickers* v. *Vickers*, 37 Ch. 525.
(*n*) *Lawes* v. *Lawes*, 20 Ch. Div. 81.
(*o*) *Hodgson* v. *Braisby*, 1903, 1 Ch. 267.
(*p*) *Ingram* v. *Papillon*, 1897, 2 Ch. 574.
(*q*) *Whitehouse* v. *Edwards*, 37 Ch. Div. 683.

Sum given by second instrument, if less, satisfaction *pro tanto*.

It was for a long time unsettled, whether, if the sum given by the second instrument was smaller than that given by the first, the less sum operated as a total satisfaction of the larger; but the true rule was at length established, that an advancement subsequent to the will, if less in amount than the sum given by the will, was a satisfaction *pro tanto* only (*r*). It is to be remembered, however, that every payment by a father to his child is not to be regarded as a *portion* for the child,—or as being on account of that child's portion,—the contrary being usually the case (*s*).

Legacy to a child or wife, being a creditor.

Where a parent or husband gives a legacy to his child (*t*) or wife (*u*), to whom he is already *indebted*,—The case stands on the same footing as a legacy to any other person in satisfaction of a *debt* (*x*); and that is also so, whether the debt has arisen upon the covenant of the husband (*y*), or has arisen on account of some breach of trust (*z*). And where a parent (indebted to his child) advances to the child (upon marriage) a portion equal to or exceeding the debt, it will *primâ facie* be considered a satisfaction (*a*); and (in such a case) it is immaterial, that the child may be ignorant of the debt (*b*). Also, conversely, if a son is indebted to his father, and the father gives up the debt to the son, and afterwards dies intestate,—The Court considers, that (*to the extent of the debt so forgiven*) the son is advanced, —So that, in such a case, he must bring the amount into hotchpot, before he will be permitted to share with the other children in the distribution of the intestate's estate (*c*).

Advancement to child or wife, being a creditor.

Debt owing by child to father,—. forgiven by father, is an advancement.

Extrinsic evidence,—question of its admissibility

The rule against double portions being a presumption of law, it may (like other presumptions of law) be re-

(*r*) *Pym* v. *Lockyer*, 5 My. & Cr. 29.
(*s*) *Taylor* v. *Taylor*, L. R. 20 Eq. 155.
(*t*) *Stocken* v. *Stocken*, 4 Sim. 152.
(*u*) *Fowler* v. *Fowler*, 3 P. Wms. 353.
(*x*) *Crichton* v. *Crichton*, 1895, 2 Ch. 853.
(*y*) *Cole* v. *Willard*, 25 Beav. 568.
(*z*) *Plunkett* v. *Lewis*, 3 Hare, 316.
(*a*) *Gillings* v. *Fletcher*, 38 Ch. Div. 373.
(*b*) *Wood* v. *Briant*, 2 Atk. 521.
(*c*) *Blockley* v. *Blockley*, 29 Ch. Div. 250.

butted by evidence of extrinsic circumstances; and, in *Kirk* v. *Eddowes* (*d*), where a father bequeathed £3,000 for the separate use of his daughter for life, with ulterior trusts for her children,—and he subsequently gave the daughter and her husband a promissory note for £500; and the defendants (the executors of the father), desiring to show, that the £500 was a satisfaction *pro tanto* of the legacy of £3,000, tendered parol evidence of the declarations of the father at the time of handing over the note,—Wigram, V.-C., held, that the evidence was admissible, observing:—"If a second instrument do not in terms adeem the first, but the case is of that class in which (from the relation between the author of the instrument and the party claiming under it) *the law raises a presumption that the second instrument was an ademption of the gift by the instrument of earlier date*, evidence may be gone into, to show, that such a presumption is not in accordance with the intention of the author of the gift; *and where evidence is admissible for that purpose, counter-evidence is also admissible*,—Because, of course, in such cases, the evidence is NOT admitted for the purpose of proving (*in the first instance*) with what intent either writing was made, *but for the purpose only of ascertaining, whether the* PRESUMPTION *which the law has raised be well or ill founded.*" or non-admissibility.

(*d*) 3 Ha 509.

CHAPTER XIV.

ADMINISTRATION OF ASSETS.

Assets.

THE property of a deceased testator (or intestate), regarded in the light of its liability to answer the debts of the deceased, is called his *assets;* and assets are either *legal* or *equitable,*—(1) *Legal assets* comprising such portions of the property as were always available at law for the payment of the debts,—and with which, accordingly, the executor or administrator (as such) was chargeable in an action at law by a *creditor* of the deceased; and

(1) Legal assets.

(2) Equitable assets.

(2) *Equitable assets* comprising such portions of the property as used to be available for the *creditor* in a Court of Equity only (*a*).

Legal and equitable assets,—importance of distinction between, formerly and at present.

The distinction between legal and equitable assets was formerly of much more importance than it is now,—*Scil.*, because, out of *legal* assets, the specialty debts were paid before the simple contract debts; while, out of *equitable* assets, these two different species of debts were payable *pari passu* (*b*); but Hinde Palmer's Act (*c*) abolished the priority of specialty debts over simple contract debts (*d*), in the administration of the *legal* assets of all persons dying on or after the 1st January, 1870.

The order of priority in the payment of debts,—out of *legal* assets as regards deaths before 32 & 33 Vict. c. 46.

In the case of persons who have died before the 1st January, 1870, the following was the order in which the different species of debts were payable out of *legal* assets,—That is to say:—

(1) Debts due to the crown (by record or specialty),

(*a*) *Cook* v. *Gregson*, 3 Drew. 549.
(*b*) *Plunkett* v. *Penson*, 2 Atk. 290.
(*c*) 32 & 33 Vict. c. 46.
(*d*) *Att.-Gen.* v. *Leonard*, 38 Ch. D. 622.

—crown-executions also having priority over other executions (*e*), and crown-distresses over other distresses (*f*).

(2) Debts which had priority by statute, viz., property tax and income-tax (*g*); poor-rates and other rates; the amount due to a building society from the estate of its secretary (*h*), or the amount due to a savings bank from the estate of its actuary (*i*), or to a friendly society from the estate of its treasurer (*k*).

(3) Judgments against the deceased duly registered, and unregistered judgments against his personal representatives (*l*),—but not mere orders to sign judgment (*m*).

(4) Recognisances and statutes.

(5) Specialty debts for value,—including arrears of rent (*n*); calls on shareholders (*o*), &c.

(6) Debts by simple contract,—the crown again having priority here (*p*),—unregistered judgments against the deceased (*q*), and claims for dilapidations under the Ecclesiastical Dilapidations Act, 1871 (*r*), being (for this purpose) regarded as simple contract debts.

(7) Voluntary bonds,—excepting that if the voluntary bond had (in the life of the obligor) been assigned for value, it stood on the same footing as a specialty debt for value (*s*).

The order of priority in the payment of debts,—out of *equitable* assets, and also (under the Act of 1869) out of *legal* assets.

By running together the debts comprised in the fifth and the sixth of the above-mentioned groups, you obtain the order in which the different species of debts were always payable out of *equitable* assets; and in cases where Hinde Palmer's Act applies, the order last mentioned is also the order in which the different species of debts are now payable out of *legal* assets also,—the effect

(*e*) *Giles* v. *Grover*, 1 Cl. & F. 72.
(*f*) *Att.-Gen.* v. *Leonard*, 38 Ch. D. 622.
(*g*) *Re Hanley & Co., Limited*, 9 Ch. Div. 469.
(*h*) *Moors* v. *Marriott*, 7 Ch. Div. 543.
(*i*) Savings Bank Act, 1891, s. 13.
(*k*) *In re Miller*, 1893, 1 Q. B. 327; 59 & 60 Vict. c. 25, s. 35; Savings Banks Act, 1891, s. 13.
(*l*) *Re Williams*, L. R. 15 Eq. 270; *Smith* v. *Morgan*, 5 C. P. D. 337.
(*m*) *Clifford* v. *Gurney*, 1896, 2 Ch. 863.
(*n*) *Shirreff* v. *Hastings*, 6 Ch. Div. 610.
(*o*) *Buck* v. *Robson*, L. R. 10 Eq. 629.
(*p*) *Bentinck* v. *Bentinck*, 1897, 1 Ch. 673.
(*q*) *Van Gheluive* v. *Nerinckz*, 21 Ch. Div. 189.
(*r*) *Wayman* v. *Monk*, 35 Ch. Div. 583.
(*s*) *Payne* v. *Mortimer*, 4 De G. & J. 447.

of that Act (wherever it applies) being, to abolish (in every administration action) the distinction between legal and equitable assets, so far as regards creditors whether by specialty or by simple contract. But, *nota bene*, the Act has not prejudiced (*t*), but has even (*semble*) enlarged (*u*), the executor's right of retainer; and the Act has not in any way prejudiced the crown's priority (*x*).

Executor may prefer one creditor to another,—until decree, or receiver or injunction.

The order of payment above specified is that which is observed, where the assets are applied in a due course of administration: But there is nothing to prevent an executor from paying one simple contract creditor before another simple contract creditor (*y*), or from paying one specialty creditor before another specialty creditor (*z*), or from paying a statute-barred debt (*a*),—At least, at any time before decree in an administration action, where no receiver of the estate has been appointed or injunction obtained (*b*). And, in order to prevent such preferential payment, it is necessary, either to obtain an injunction or the appointment of a receiver in the action before decree, or else to obtain a speedy consent decree for administration (*c*),—or else some limited order to the same effect (*d*). And, *nota bene*, where the grant of probate is delayed, and an interim administrator has been appointed, any creditor may obtain a decree for administration (either general or limited) against such administrator (equally as if he were an executor (*e*)); but you cannot get any such decree until you have a legal personal representative of some sort (*f*),—although you may (perhaps) be able to get some interim protective relief (*g*).

Legal assets,—examples of.

Legal Assets comprise (among many other properties) lands *not charged* with the payment of debts; and such

(*t*) *Job* v. *Job*, 6 Ch. Div. 562; *Wilson* v. *Coxwell*, 23 Ch. Div. 764.
(*u*) *Robbins* v. *Alexander*, 1906, 2 Ch. 584.
(*x*) *Bentinck* v. *Bentinck*, *supra*.
(*y*) *Waring* v. *Danvers*, 1 P. Wms. 294.
(*z*) *Cunliffe-Smith* v. *Hankey*, 1899, 1 Ch. 541.
(*a*) *Bray* v. *Tofield*, 18 Ch. Div. 551.
(*b*) *In re Radcliffe*, 7 Ch. Div. 733; *Vibart* v. *Coles*, 24 Q. B. D. 364.
(*c*) *Hanson* v. *Stubbs*, 8 Ch. Div. 154; *In re Hargreaves*, 44 Ch. D. 236.
(*d*) *Brown* v. *Burdett*, 40 Ch. Div. 244.
(*e*) *Westwood* v. *Booker*, 1897, 1 Ch. 866.
(*f*) *Rowsell* v. *Morris*, L. R. 17 Eq. 20.
(*g*) *Coote* v. *Whittington*, L. R. 16 Eq. 534.

lands were for the first time made liable as assets for payment of the debts generally in 1833 (by the statute 3 & 4 Will. IV. c. 104, which extended to deceased *non-traders* the remedy given in 1807, by the 47 Geo. III. c. 74 and 11 Geo. IV. & 1 Will. IV. c. 47, against the estates of deceased *traders* (*h*)); but the lands were (by that Act) made liable in an administration action in equity only,—and were not, until the Land Transfer Act, 1897 (*i*), s. 2, sub-s. 2, made them so, liable otherwise than in such an action.

Equitable assets,—varieties of:

Equitable assets, on the other hand, consist of (or comprise) (1) Property over which a testator (*k*) or testatrix (*l*) has exercised a general power of appointment vested in him or her,—*Scil.*, to the extent that the power is so exercised (*m*); and (2) The separate estate of a married woman,—it having been, in fact, only through a Court of Equity that the creditors of a married woman could (at one time) have got at the separate estate at all (*n*); and the remedy which is now obtainable in a Court of law against the separate estate, is still the equitable remedy only (*o*).

(1) Equitable assets, by nature of property itself,—enumeration of.

(a) Property actually appointed in exercise of general power.

(b) Separate estate of married women.

(2) Equitable assets, by act of testator.

Lands charged with (or devised upon trust for) the payment of the debts of the deceased are also equitable assets; and between a charge and a trust, these distinctions are to be remembered, namely, Firstly, that, when lands are *devised upon trust* to pay the debts, the trust-devisee must retain the mesne rents and profits towards payment of the debts; but if the lands are merely *charged* with the payment of the debts, the person who (subject to the charge) is beneficially entitled to the lands takes (for his own benefit) the mesne rents and profits, and is not, in the general case, liable to refund same. But, *nota bene*, if the lands devised are charged also (or only) with the payment of the legacies, the legatees are

Charge of debts distinguished from trust,—

(1) In a trust for payment of debts, mesne rents to be retained; *secus*, in a charge of debts.

(*h*) *Small* v. *Hedgely*, 34 Ch. Div. 379.
(*i*) 60 & 61 Vict. c. 65.
(*k*) *Pardo* v. *Bingham*, L. R. 6 Eq. 485.
(*l*) *Bell* v. *Stocker*, 10 Q. B. D. 129.
(*m*) *Darley* v. *Hodgson*, 1899, 1 Ch. 666.
(*n*) *Murray* v. *Barlee*, 3 My. & K. 209.
(*o*) *Scott* v. *Morley*, 20 Q. B. D. 120.

not, in any case, entitled (as against the charged devisee) to the back rents,—even although the estate should prove insufficient for payment of their legacies (*p*).

(2) In a trust for payment of debts, lapse of time no bar; but in a charge, creditors may be barred by lapse of time.

And it is to be remembered, Secondly, that, as between an express trustee and his *cestui que trust*, no length of time is a bar (*q*),—while if the creditors have merely a *charge* upon the lands in their favour, they must look after themselves (*r*): That is to say, for a devastavit by executors, the remedy is barred after six years (*s*),—although, for an administration action, the period of twelve years (formerly twenty years) is the limit in general,—as regards both testators and intestates,—save as regards assets subsequently falling in (*t*); and under the Real Property Limitations Act, 1874, s. 10, as regards any legacy, even where it is *charged* upon (or payable out of) land (*u*), the twelve years' limit of time for the recovery thereof is now applicable, notwithstanding that the *legacy is also secured by an express trust* (*x*): And, *nota bene*, it makes no difference that the land is reversionary (*y*),—a chargee by will, differently from a chargee by deed (*z*), having no right of foreclosure.

Statute-barred debts,—when they may or may not be paid by the executor.

As regards the Statutes of Limitation generally,—The statutes 21 Jac. I. c. 16 (simple contract debts) and 3 & 4 Will. IV. c. 42 (specialty debts) bar the remedy only, but do not extinguish the debt itself; but the statutes 3 & 4 Will. IV. c. 27 and 37 & 38 Vict. c. 57 (moneys charged on land) not only bar the remedy, but also extinguish the debt (*a*), and the Trustee Act, 1888, s. 8, would, *semble*, be interpreted distributively, in order to preserve that distinction.

It follows, that an executor may not pay a debt which has been wholly extinguished by the 3 & 4 Will. IV c. 27 and 37 & 38 Vict. c. 57,—although he may (and a

(*p*) *Allen* v. *Longstaffe*. 37 Ch. Div. 48.
(*q*) *Hughes* v. *Wynne*, T. & R. 309.
(*r*) *Scott* v. *Jones*, 4 Cl. & Fin. 382.
(*s*) *Blake* v. *Gale*, 22 Ch. Div. 820.
(*t*) *Bowles* v. *Hyatt*, 38 Ch. D. 609.
(*u*) *Jay* v. *Johnstone*, 1893, 1 Q. B. 189.
(*x*) *Warburton* v. *Stephens*, 43 Ch. Div. 39.
(*y*) *In re Owen*, 1894, 3 Ch. 220.
(*z*) *Hugill* v. *Wilkinson*, 38 Ch. D. 480.
(*a*) *Sanders* v. *Sanders*, 19 Ch. Div. 373.

trustee also may (*b*)) pay a debt barred by the 21 Jac. I. c. 16, or 3 & 4 Will. IV. c. 42,—and either of them may (until there is a decree for administration) do so, although the personal estate is insufficient for the payment of the other debts (*c*). But, *after a decree or judgment for administration*, the executor may no longer voluntarily pay a statute-barred debt,—the other creditors,—and even the legatees or next of kin,—being entitled to object to the payment of the statute-barred debt (*d*),—other than the plaintiff's own debt (*e*). Also, *nota bene*, a specific devisee, if the plaintiff-creditor was proceeding against him in the action, might have objected (and still, of course, may object) to the payment of the statute-barred debt of the plaintiff also (*f*); but if no one objected, the Court would not itself have refused to pay a statute-barred debt (*g*). But when the estate is insolvent,—and the administration thereof is within s. 10 of the Judicature Act, 1875,—no debt that is statute-barred may now be paid in the administration.

Effect of decree or judgment for administration,—as regards statute-barred debts.

Effect, if estate insolvent.

A debt which is statute-barred under the 21 Jac. I. c. 16, may be revived by a written acknowledgment made to the creditor containing a promise to pay (*h*); and similarly, a debt which is statute-barred under the 3 & 4 Will. IV c. 42, may be revived by such a written acknowledgment,—only the acknowledgment need not (in this latter case) amount to a promise to pay, and may therefore be made to a third person (*i*); and every such acknowledgment, when given by one of several executors, suffices to bind the personal estate of the deceased, although not to bind the co-executors of the acknowledging executor personally (*k*). But as regards debts within the 3 & 4 Will. IV. c. 27 and 37 & 38 Vict. c. 57, if the debt be already extinguished by the statute, no acknowledgment can possibly revive it (*l*).

Effect of acknowledgment of statute-barred debts.

(*b*) *Budgett* v. *Budgett*, 1895, 1 Ch. 202.
(*c*) *Lowis* v. *Rumney*, L. R. 4 Eq. 451.
(*d*) *Moodie* v. *Bannister*, 4 Drew. 432.
(*e*) *Briggs* v. *Wilson*, 5 De G. M. & G. 21.
(*f*) *Briggs* v. *Wilson*, *supra*.
(*g*) *Hunt* v. *Wenham*, 1892, 3 Ch. 59.
(*h*) *Mitchell's case*, L. R. 6 Ch. App. 822.
(*i*) *Moodie* v. *Bannister*, *supra*.
(*k*) *Dick* v. *Fraser*, 1897, 2 Ch. 181
(*l*) *Sanders* v. *Sanders*, *supra*.

Joint liability of heir and devisee under 3 W. & M. c. 14.

Real estate (unless charged with debts) not having been originally liable for the payment of the debts,—excepting only such debts as the testator had specifically bound himself *and his heirs* to pay,—and testators having been still at liberty, even after specifically binding their heirs, to defeat their creditors by devising the lands away from their heirs,—Therefore, by the statute 3 W. & M. c. 14, commonly called "the Statute of Fraudulent Devises," the *devisee* of a debtor who had specifically bound his heirs was made liable jointly with the heir: Therefore, in such a case, if the *heir* or the *devisee* aliened the lands, the purchase-moneys received on the sale thereof were liable for the debts; and afterwards (by the 11 Geo. IV. & 1 Will. IV. c. 47) such heir or devisee,—*to the extent of the value of the lands so alienated*(*m*), and although the alienation was equitable only (*n*),—became personally liable for the debts of the deceased, equally as for his own debts: But, *nota bene*, residuary legatees and next of kin, alienating their beneficial shares and interests, are not within any of these provisions (*o*). A mere general direction by a testator, that his debts shall be paid, effectually charges them on his real estate (*p*),—although there are certain exceptions to that: Because, Firstly, where a testator (after a general direction for the payment of his debts) specifies a particular fund for the purpose, "the general charge by implication is controlled by the specific charge" (*q*); and, secondly, where the debts are directed to be paid by the executors, and they (the executors) are not also the devisees of the real estate, the presumption is, that the debts are to be paid exclusively out of the assets which come to the executors as such (*r*).

A general direction by testator for payment of his debts,—effect of.

Effect, where testator has specified a particular fund for payment of debts.

Effect, where executors, not being also devisees, are directed to pay the debts.

Sale,—and sometimes a mortgage,—for payment of debts.

A direction to raise the required money for the payment of the debts, out of the "*rents and profits*" of the real estate, amounts, in general, to a charge upon the *corpus* or inheritance,—and therefore authorises a sale or

(*m*) *Small* v. *Hedgely*, 34 Ch. Div. 379.
(*n*) *In re Atkinson*, 1908, 2 Ch. 307.
(*o*) *Dilkes* v. *Broadmead*, 2 De G. F. & J. 566.
(*p*) *Legh* v. *Warrington*, 1 Bro. P. C. 511.
(*q*) *Price* v. *North*, 1 Ph. 85.
(*r*) *Cook* v. *Dawson*, 3 De G. F. & J. 127.

mortgage of the real estate for that purpose (*s*),—*Secus*, if the direction is to pay the debts out of the "*annual rents and profits*" (*t*). And where the charge is on the *corpus* or inheritance, the Court inclines to directing a sale rather than a mortgage,—but will direct a mortgage, where there are sufficient reasons against a sale (*u*).

Purchasers and mortgagees,—when and when not affected by the debts.

A specific lien or charge upon the lands will, of course, not be affected by a general charge of the debts,—That is to say,—Neither debts by specialty nor simple contract debts constitute any lien or charge upon the lands (*x*),—So that a purchaser or mortgagee of the lands,—even an equitable mortgagee thereof (*y*),—before any action for administration of the real estate has been instituted,—would take free of (and would not be bound to inquire into the existence of) the debts: But if an action for the administration of the real estate has been commenced, *and a decree has been made therein*,—or if (even before decree) the action has been registered as a *lis pendens*, and extends to claiming against the real estate,—the purchaser or mortgagee would not be safe in completing his purchase or mortgage (*z*). But none of these risks attach to sales and mortgages of personal estate (*a*).

Judgment debts,—when and when not, and how made, a lien on the lands.

Judgment debts may or may not be or become a charge or lien on the lands,—*Scil.*, as against a purchaser or mortgagee of the lands: The law is complicated,—the legislation having been as follows:—

(1) By the 4 & 5 W. & M. c. 20 (s. 3), a judgment debt (unless docketed) had no preference in the administration of the assets, but only ranked *pari passu* with simple contract debts,—So that the executor might have preferred to such judgment creditor any simple contract creditor;

(2) By the 1 & 2 Vict. c. 110 (s. 19) and 2 & 3 Vict.

(*s*) *Bootle* v. *Blundell*, 1 Mer. 232.
(*t*) *Baldock* v. *Green*, 40 Ch. D. 610.
(*u*) *Metcalfe* v. *Hutchinson*, 1 Ch. Div. 591.
(*x*) *Holmes* v. *Holmes*, 1907, 2 Ch. 304.
(*y*) *British Mutual* v. *Smart*, L. R. 10 Ch. App. 567.
(*z*) *Price* v. *Price*, 35 Ch. Div. 297.
(*a*) *Berry* v. *Gibbons*, L. R. 8 Ch. App. 749, *n*.

c. 11, a judgment was required to be registered (and also every five years re-registered) in the Court of Common Pleas,—and otherwise it did not affect subsequent purchasers, mortgagees, or creditors (*b*); And, latterly, —by the 23 & 24 Vict. c. 38 (s. 1), the execution also, which had issued on the judgment required to be registered, *and to be thereafter put in use within three calendar months;* and

(2b) By the 23 & 24 Vict. c. 38 (s. 3), the protection which the *executor* used to have against judgments remaining undocketed, was extended to judgments remaining unregistered (*c*).

(3) By the 27 & 28 Vict. c. 112, a judgment (even although duly registered) ceased altogether to be a *lien* on the lands of the debtor, unless and until execution had been sued out thereon and also registered,—either the legal execution by *elegit*, or the equitable "*relief in the nature of execution*," which resulted from the appointment of a receiver of the lands (*d*): But, by the 51 & 52 Vict. c. 51 and 63 & 64 Vict. c. 26, the execution or receivership order must now be registered at the Land Registry (in the register there of *writs and orders*),—and need not be registered elsewhere.

Administration under the Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10,—when estate insolvent.

By the Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10,—"In the administration by the Court of the assets of any person who may die after the commencement of the Act, *and whose estate may prove to be* INSUFFICIENT *for the payment in full of his debts and liabilities*" (*including the costs of the action for administration* (*e*)),—"and in the winding up also of any company, under the Companies Act, 1908, s. 207, whose assets may prove to be insufficient for the payment of its debts and liabilities (and the costs of the winding up),—The same rules are to prevail and be observed,—

"(1) As to the *respective rights of secured and unsecured creditors;* and

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(*b*) *Benham* v. *Keane*, 3 De G. F. & J. 318.
(*c*) *Fuller* v. *Redman*, 26 Beav. 600.
(*d*) *Anglo-Italian Bank* v. *Davies*, 9 Ch. Div. 275.
(*e*) *Tarn* v. *Emmerson*, 1895, 1 Ch. 652.

"(2) As to the *debts* and *liabilities provable;* and
"(3) As to the *valuation* of annuities and future and *contingent liabilities* respectively,"—
as are in force in bankruptcy:

(a) Secured and unsecured creditors, *inter se.*

I. *As regards Secured and Unsecured Creditors.*—The old rule in Chancery was, that a secured creditor might (in addition to his rights under his security) prove for the *whole* amount of his debt against the general estate (*f*),—but not so as to receive more than the full amount of his debt. But he has now to elect, between (1) Resting on his security (and compelling the trustee in bankruptcy to redeem him); and (2) Realising his security and proving for the deficiency (if any (*g*)),—or else (3) Valuing his security (*h*),—and revaluing it, if need be (*i*),—or otherwise amending his original valuation (if inadvertently erroneous (*k*)),—and proving for the deficiency (*l*): But he may, of course, (4) Surrender his security, and prove for the whole amount of his debt (*m*). And, *nota bene,* where he holds divers securities for divers debts, he may not lump them,—*Scil.*, as against the general creditors (*n*),—nor, of course, as against any subsequent secured creditor (*o*).

Secured creditors,—who are, and who are not?

A secured creditor is usually a mortgagee; but he may be a judgment creditor who has obtained a charging order (on stocks or shares (*p*)), or a garnishee order *nisi* (*q*), or a sequestration order (*r*), and who has (in each case) duly proceeded under the order (*s*). Or generally, he may be a judgment creditor, who has issued a *fi. fa.*, an *elegit,*

(*f*) *Kellock's case*, L. R. 3 Ch. App. 769.
(*g*) *Quartermaine's case*, 1892, 1 Ch. 639.
(*h*) *Deering* v. *Bank of Ireland*, 12 App. Ca. 20.
(*i*) *In re Fanshawe*, 1905, 1 K. B. 170.
(*k*) *In re Attree, Ex parte Ward*, 1907, 2 K. B. 868.
(*l*) *King* v. *Chick*, 39 Ch. Div. 567.
(*m*) *Williams* v. *Hopkins*, 18 Ch. Div. 370.
(*n*) *James* v. *London & County Bank*, 1899, 1 Ch. 485.
(*o*) *In re Pearce*, 1909, 2 Ch. 492, overruling *Pearce* v. *Bullard*, 1908, 1 Ch. 780.
(*p*) *Stewart* v. *Rhodes*, 1900, 1 Ch. 386.
(*q*) *Ex parte Joselyne*, 8 Ch. Div. 327.
(*r*) *In re Pollard*, 1903, 2 K. B. 41.
(*s*) *In re Pollard, supra; Re Webster*, 1907, 1 K. B. 623.

or other legal execution,—and who has duly followed up the same: But an execution, *unless duly followed up,* will not suffice (*t*).

Receivership order,—effect of.

A receivership order against *lands,* being first duly registered, appears to make the creditor a secured creditor, without any occasion for him to do more (*u*); but a receivership order in the case of goods appears not to create a charge in favour of the creditor,—*Scil.*, as against a subsequent assignee (whether purchaser or mortgagee) who gives notice of his assignment (*x*): At the same time, the receivership order, even as regards *goods,* has some sort of operation in favour of the creditor,—That is to say, it may (*being duly followed up*) be perfected into a charge (*y*); and in the meantime (and until it is so perfected) it prevents any subsequent *judgment creditor* (but not any subsequent assignee) from getting priority (*z*).

Landlord,—as regards his rent, not a secured creditor.

The holder of a bill of sale, although unregistered, used to be a secured creditor; and if registered, he would, of course, still be one. But a landlord, in respect of his arrears of rent, is not a secured creditor,—within the meaning either of the Bankruptcy Act, 1883, or of the Judicature Act, 1875 (*a*),—*Scil.*, because, until the landlord's right of distress for these arrears has been exercised by an actual seizure, the mere right of distress does not give him any charge; and he has, in fact, no lien on the goods distrained even after the distress (*b*),—*Scil.*, where the tenant replevies (*c*). Also, now, even where the landlord proceeds to distrain, the sale proceeds arising from the distress are liable to all preferential debts (*d*).

(b) Debts and liabilities provable,—

II. *As regards the Debts and Liabilities provable.*—Under s. 37 of the Bankruptcy Act, 1883, all debts and

(*t*) *In re Potts*, 1893, 1 Q. B. 648.
(*u*) *In re Pope*, 17 Q. B. D. 743.
(*x*) *Wigram* v. *Buckley*, 1894, 3 Ch. 483.
(*y*) *Flegg* v. *Prentice*, 1892, 2 Ch. 428.
(*z*) *De Galve* v. *Gardner*, 1903, 2 Ch. 727.
(*a*) *Thomas* v. *Patent Lionite Co.*, 17 Ch. Div. 250.
(*b*) *Newton* v. *Scott*, 9 Mee. & W. 434.
(*c*) *Braddyl* v. *Ball*, 1 Bro. C. C. 427.
(*d*) 8 Edw. VII. c. 69, s. 209.

liabilities, present or future, certain or contingent (other than damages for a *tort*, and other than debts and liabilities contracted *with notice* of an act of bankruptcy), to which the debtor is subject *at the date of the receiving order* (or to which he may *before his discharge* become subject, by reason of any obligation incurred before the date of the receiving order), are provable in the bankruptcy,—including even, *semble*, the damages sustained by the true owner of goods and chattels from the vesting of such goods and chattels in the trustee in the bankruptcy of the debtor by reason of the "*order and disposition*" clause in the Bankruptcy Act, 1883 (*e*). And, by s. 30 of that Act, the order of discharge releases the bankrupt from all the debts and liabilities which are so provable (even from crown debts) (s. 150 (*f*)),—other than the debts following, that is to say,— Bankruptcy Act, 1883: Section 37. Section 30.

(1) Debts due on recognisances;
(2) Debts due for offences against the revenue,—or due on bail-bonds given in respect of revenue prosecutions;
(3) Debts incurred by means of any fraud;
(4) Debts incurred by means of any fraudulent breach of trust (*g*);
(5) Debts and liabilities forborne by any fraud,—including (under the Bankruptcy Act, 1890 (*h*), s. 10), debts in respect of affiliation orders, seduction judgments, and divorce decrees.

Under s. 37 of the 1883 Act, any provable debt or liability (the value of which requires to be estimated) may be *declared by the Court to be incapable of fair estimation*, —In which case, it ceases to be a provable debt, and will not be destroyed by the bankrupt's discharge; but such precautionary declaration is indispensable, if the debt or liability is not to be destroyed by the bankrupt's discharge (*i*). Section 37.

(*e*) *Ex parte Haviside*, 1907, 2 K. B. 180.
(*f*) *In re Thomas*, 21 Q. B. D. 380.
(*g*) *Ex parte Coker*, L. R. 10 Ch. App. 652.
(*h*) 53 & 54 Vict. c. 71.
(*i*) *Hardy* v. *Fothergill*, 13 App. Ca. 351.

Section 40. By s. 40 of the 1883 Act, all debts proved in the bankruptcy are to be paid *pari passu*,—Other than moneys of a Friendly Society (*k*) in the hands of the bankrupt as the duly appointed officer of the society (which are to be paid before all other debts whatsoever); and other than the following classes of debts,—which are to have priority over the other debts, and are *inter se* to be paid *pari passu*, —That is to say,—

(1) Parochial rates and local rates generally, due from the bankrupt at the date of the receiving order, and which have (within the *twelve* months next before such date) become due and payable; Also,

(1*a*) Assessed taxes, land tax, and property or income tax (not exceeding, in the whole, *one year's* assessment), assessed on the bankrupt up to the 5th day of April next before the date of the receiving order; And

(2) The wages and salaries (not exceeding £50 in each case) of clerks and servants for the *four* months next before the date of the receiving order; and the wages (not exceeding £25 (*l*) in each case) of labourers and workpeople for the *two* months next before the date of the receiving order (*m*); and (under the Workmen's Compensation Act, 1906 (*n*)), the compensation amount payable to any workman under the Act.

Section 41. And by s. 41 of the 1883 Act, an apprenticeship premium may (as to a reasonable part thereof) be ordered to be repaid,—according to an old principle of equity (*o*).

Section 42. By s. 42, a landlord may distrain for (and thereby be paid in full) arrears of rent (not exceeding six months' arrears), accrued due prior to the date of the order of

Section 38. adjudication; and, by s. 38, a set-off is given in the case of "*mutual* credits, *mutual* debts, and other *mutual*

(*k*) *Jones* v. *Williams*, 36 Ch. Div. 573.
(*l*) 51 & 52 Vict. c. 62, s. 1; 60 & 61 Vict. c. 19.
(*m*) 51 & 52 Vict. c. 62.
(*n*) 6 Edw. VII. c. 58, s. 5, sub-s. 3.
(*o*) *Hale* v. *Webb*, 2 Bro. C. C. 38.

dealings," between the bankrupt and the proving creditor (*p*).

By s. 9, no creditor of the bankrupt is to have, in respect of any debt provable in the bankruptcy, any remedy (outside the bankruptcy) against the person (*q*) of the debtor, or against his property,—nor is he to commence (unless with the leave of the Court) any action in respect of such debt; but a mortgagee's remedy by foreclosure is not affected by any of these provisions (*r*). Section 9.

Therefore, generally, where the estate is insolvent,—All debts (including even voluntary bonds (*s*)) are now payable *pari passu* in an administration in the Chancery Division,—Nevertheless, crown debts still retain (in effect) their priority (*t*); and a Savings Bank (*u*), or a Friendly Society (*x*), still retains its priority; and a judgment creditor, *semble*, still retains his priority,—provided his judgment has been obtained against the executor of the deceased debtor (*y*), or against the administrator of the deceased debtor (*z*),—or (if obtained against the deceased debtor himself) has been duly registered (*a*). Also, those rules of bankruptcy which go merely to "*swell the assets*" (so to speak),—namely, the rule as to the limitation of the landlord's right of distress for rent in arrear (*b*); and the rule as to reputed ownership (*c*); and the rule as to the avoidance of voluntary settlements (*d*); and the rule as to the avoidance of executions for £20, where the sheriff has notice within fourteen days after the levy (*e*),—and generally of

Rules of proof in bankruptcy that are still inapplicable in Chancery.

(1) Crown debts.

(2) Judgment debts, &c.

(3) Arrears of rent.

(4) Reputed ownership, &c.

(*p*) *In re Daintrey*, 1900, 1 Q. B. 546.
(*q*) *Holditch* v. *Mist*, 1 P. Wms. 694.
(*r*) *Hardy* v. *Farmer*, 1896, 1 Ch. 904.
(*s*) *Ex parte Pottinger*, 8 Ch. D. 621.
(*t*) *In re Oriental Bank*, 28 Ch. Div. 643.
(*u*) Savings Banks Act, 1891, s. 13.
(*x*) *Re Miller*, 1893, 1 Q. B. 327.
(*y*) *Smith* v. *Morgan*, 5 C. P. D. 337; *Crawter* v. *Marvin*, 1905, 2 Ch. 490.
(*z*) *Williams* v. *Williams*, L. R. 15 Eq. 270.
(*a*) *Whitaker* v. *Palmer*, 1901, 1 Ch. 9.
(*b*) *Fryman* v. *Fryman*, 38 Ch. Div. 468.
(*c*) *Gorringe* v. *Irwell Co.*, 34 Ch. Div. 128.
(*d*) *In re Gould*, 19 Q. B. D. 92.
(*e*) *Pratt* v. *Inman*, 43 Ch. Div. 175.

executions not perfected before the date of the receiving order (*f*),—those rules have (none of them) been introduced into the administration in Chancery.

Rules of proof in bankruptcy that are made applicable in Chancery.

(1) Debts, proof of, generally.

(2) Wages and salaries, &c.

(3) Rates, &c.

(4) Set-off.

On the other hand, the preferences which by the Preferential Payments in Bankruptcy Act, 1888 (*g*), as aided by the Workmen's Compensation Act, 1906 (*h*), are given to wages and salaries, compensation-amounts for accidents, parochial and other rates, and assessed taxes, are applicable in the administration of an insolvent estate (*i*). And as regards the set-off of debts,—the mutual credit clause in the Bankruptcy Act, 1883, is applicable in Chancery (*k*).

(5) Interest.

As regards interest, a creditor on the estate whose debt bears interest is only entitled to interest up to the date of the judgment for administration (*l*); but if there is any surplus, then (under s. 40 of the Bankruptcy Act, 1883) interest at the rate of 4 per cent. per annum on all debts, and at the rate of interest they bear on all interest-bearing debts, is payable from the date of the receiving order (*m*). Also, generally, so long as there are assets, creditors may come in and prove, not disturbing any prior dividend (*n*). And there is the like distinction in administration as in bankruptcy, between the principal administration of assets and the administrations ancillary thereto in foreign countries (*o*): That is to say, Each auxiliary local representative observes the rules applicable to the administration within his own jurisdiction,—and once he has satisfied all the debts and duties there, he remits the surplus (if any) to the principal administrator; but, of course, the *lex loci rei sitæ* is exclusively applicable to the real estate (including the leaseholds) of the deceased (*p*). Also, *nota bene*, in the case of Stock Exchange

(6) Late proofs, &c.

(7) Principal and ancillary administrations.

(*f*) *In re National Corporation*, 1901, 1 Ch. 950.
(*g*) 51 & 52 Vict. c. 62.
(*h*) 6 Edw. VII. c. 58.
(*i*) *Parkington* v. *Heywood*, 1897, 2 Ch. 593.
(*k*) *Mersey Steel Co.* v. *Naylor*, 9 App. Ca. 434.
(*l*) *King* v. *Chick*, 39 Ch. Div. 567.
(*m*) *In re Duncan & Co.*, 1905, 1 Ch. 307.
(*n*) *Harrison* v. *Kirk*, 1904, A. C. 1.
(*o*) *Eames* v. *Hacon*, 18 Ch. Div. 347.
(*p*) *Freke* v. *Lord Carbery*, L. R. 16 Eq. 461.

defaulters, an administration in Chancery may follow upon the Stock Exchange administration (*q*).

(c) Valuation of annuities, &c.

III. *As regards the Valuation of Annuities and Future and Contingent Liabilities.*—By s. 37 of the Bankruptcy Act, 1883, the trustee in the bankruptcy is to make an estimate of the value of any provable debt or liability which does not bear a certain value; and (on appeal from the trustee's estimate to the Court) the Court may (without a jury) assess the value, or may declare the debt or liability incapable of being fairly estimated: Therefore the value of an annuity payable to a female, for her life (*r*) or during her widowhood (*s*) or *dum casta fuerit* (*t*), must be estimated,—due weight being of course given to the possibility of cesser (when there is a possibility of cesser) during the life of the annuitant (*u*); and these rules apply to an administration in Chancery (*x*).

Administration of insolvent estates,—may be in Bankruptcy Division, or in the County Court;

Also the estate of a deceased insolvent may (under s. 125) be wholly wound up in the Bankruptcy jurisdiction (*y*),—And the necessary order in that behalf may be made at any time after (or even now before (*z*)) the expiration of two months from the date of the grant of probate or of letters of administration,—Provided that a legal personal representative has been appointed (*a*), and provided also that no administration proceedings have meanwhile been taken in the Chancery Division: Which latter proceedings (if they have been already commenced) may, however, for good cause, be transferred, on the application of a creditor (*b*),—or without any such application (*c*),—into the Bankruptcy Division.

County Court,—jurisdiction of,—where

The proceedings may also be transferred into the County Court (either before or after decree (*d*)); and

(*q*) *In re Mendelssohn*, 1903, 1 K. B. 216.
(*r*) *Ashton* v. *Ross*, 1900, 1 Ch. 162.
(*s*) *Ex parte Blakemore*, 5 Ch. Div. 372.
(*t*) *Ex parte Neal*, 14 Ch. Div. 579.
(*u*) *Ex parte Pearce*, 13 Ch. Div. 262.
(*x*) *Hill* v. *Bridges*, 17 Ch. Div. 342.
(*y*) *In re Mellison*, 1906, 2 K. B. 68.
(*z*) 53 & 54 Vict. c. 71, s. 21.
(*a*) *In re Sleet*, 1894, 2 Q. B. 797.
(*b*) *Jones* v. *Williams*, 36 Ch. Div. 573.
(*c*) *Hardy* v. *Farmer*, 1896, 1 Ch. 904.
(*d*) *Atkinson* v. *Powell*, 36 Ch. Div. 233.

insolvent estate.

(by s. 122) the County Court may, *during the life even (of the insolvent debtor)*,—in lieu of ordering payment of a debt by instalments (with a view to committal),—make an order to administer the debtor's estate,—so as to stay all civil proceedings against him (*e*); and the order is equivalent to a receiving order in bankruptcy,—excepting as regards any executions not already perfected at the date of the order (*f*).

A creditor's action for administration need not (and therefore should not), since the Land Transfer Act, 1897, express that it is on behalf of the plaintiff and all other the creditors of the deceased,—not even where the action extends to administering the real estate (*g*). But the action for administration can only be commenced by one who is a creditor already at the date of commencing the action,—That is to say, a mere liability will not (but only a debt will) support that action (*h*),—although such a liability, if it mature into a debt before the certificate of debts made in the action, will be included in the certificate as a debt (*i*). Also, *nota bene*, the debt (on which the plaintiff sues) must be a debt of the deceased himself,—and not a mere demand subsequently arisen against the executor of the deceased (*k*).

Administration in Chancery,—

The judgment for administration may be for administration of the personal estate only, or it may be for administration of the real estate also:

In a creditor's action,—
(a) Personal estate:
(aa) In ordinary cases.

And, firstly, in an administration of the personal estate only,—An account is directed of the debts generally, and of the funeral expenses; and a further account is directed of the personal estate generally, received [or (in effect) received] by the executor, and of what is outstanding. And, *nota bene*, an executor is allowed, in his accounts, all his testamentary expenses (*l*), and also all other "*just*

(*e*) *Pearson* v. *Wilcock*, 1906, 2 K. B. 440.
(*f*) *Husluck* v. *Clark*, 1898, 2 Q. B. 28.
(*g*) *In re James, James* v. *James*, 1911, W. N. 169.
(*h*) *In re Hargreaves*, 44 Ch. D. 236.
(*i*) *Thomas* v. *Griffith*, 2 De G. F. & J. 555.
(*k*) *Owen* v. *Delamere*, L. R. 15 Eq. 134; *In re Kitson*, 1911, 2 K. B. 109.
(*l*) *Sharp* v. *Lush*, 10 Ch. Div. 472.

allowances,"—so that neither of those need be (nor should be (*m*)), specified in the decree for administration. The decree operates for the benefit of all the creditors who prove their debts under it; and after the decree is made, the executor exercises his powers only with the sanction of the Court (*n*),—and, in any case of difficulty, applies for directions,—as to getting in (*e.g.*) any of the personal estate that may be outstanding; and he may (on such an application) obtain leave also to bring or to defend actions.

And under the decree, interest is computed on all debts down to the date of payment,—on those that carry interest at the agreed rate, and on the others at the rate of 4 per cent.; but as regards persons dying insolvent after the 1st November, 1875, the Court allows interest on the interest-bearing debts only, and on these up to the date of the judgment for administration only (*o*): And, in such a case, the plaintiff (*p*) and the executor (*q*) both get their costs as between solicitor and client,—the costs of the executor being payable in priority (*r*).

(bb) Where deceased was in partnership.

Where the plaintiff is a partnership creditor, and asks administration of the estate of a deceased partner, the judgment declares, firstly, that all the creditors of the deceased are entitled to the benefit of the judgment; and secondly, that the surplus of the deceased partner's estate, —after satisfying his funeral expenses and SEPARATE debts,—was liable in equity at the time of his death to the JOINT debts of the partnership: And, on the footing of these two declarations, the decree then proceeds to direct an account of the funeral expenses, of the *separate* debts, and of the *joint* debts, and an inquiry what was the personal estate of the deceased (*s*),—and adjourns the further consideration.

(*m*) *Sherwin* v. *Shakspear*, 5 De G. M. & G. 517, on p. 534.
(*n*) *Berry* v. *Gibbons*, L. R. 8 Ch. App. 747.
(*o*) *In re Summers*, 13 Ch. Div. 163.
(*p*) *Wilkins* v. *Rotherham*, 27 Ch. Div. 703.
(*q*) *Moore* v. *Dixon*, 15 Ch. Div. 566.
(*r*) *Wood* v. *Turner*, 1907, 2 Ch. 126.
(*s*) *In re M'Rae*, 32 Ch. Div. 613.

(b) Real and personal estates.

Secondly, in an administration of both the real and the personal estates of the deceased debtor,—After the accounts usual in a judgment for the administration of the personal estate only, the judgment proceeds to direct (*in case the personal estate is insufficient*) an inquiry as to the real estate of the testator at the time of his death, and what (if any) are the incumbrances thereon, and the priorities of such incumbrances,—and then orders a sale of the whole (or a sufficient part) of such real estate, *with the consent of such of the incumbrancers thereon as shall consent thereto, and subject to the incumbrances of those of them (if any) who shall not consent thereto.* And, *nota bene,* the sale-proceeds (on such a sale) are brought into Court, to the "Real Estate" account; and such sale-proceeds are afterwards applied in payment (according to their priorities) of the incumbrancers who consent to the sale, and (subject thereto) are applicable towards helping the personal estate to pay the costs of the action and the general debts of the testator; and there is, in the general case, an apportionment of these costs between the real estate and the personal estate (*t*). The Court will also, in effect, "*re-open the biddings,*"—*Scil.*, in a proper case (*u*).

Decree or judgment for administration, effect of,—where assets appropriated.

The common judgment for administration being (as already mentioned) a judgment in favour of *all* the creditors who come in under the decree,—When the creditors are found, and the due proportions of the assets are set opposite their names,—so as to be *appropriated* for or towards payment of their individual debts,—the sums so appropriated become the property of the specified creditors (*x*); and any subsequently accruing assets will (upon the principle of the judgment of assets *quando acciderent*) be appropriated in like manner, and in the like proportions,—until the full amount of all the debts so specified (with interest thereon) is paid or provided for,—and the Statutes of Limitation cease to run once the appropriation is made (*y*): But the amounts so appropriated (becoming and continuing the property of the individual

(*t*) *Doughty* v. *Walker*, 1907, 2 Ch. 149.
(*u*) *In re Thomas, Bartley* v. *Thomas*, 1911, W. N. 143.
(*x*) *Ashley* v. *Ashley*, 4 Ch. Div. 757.
(*y*) *In re Dennis*, 1895, 2 Q. B. 630.

appropriatees (*z*)) can never, where they remain unclaimed, become available for the other creditors,—For if A. leaves his money in Court, it does not thereby become the property of B.; and the fact that A. and B. are both creditors of one testator can make no difference: Therefore, if it should happen, that one of the appropriatees is a limited company,—and (before receiving its appropriation) it is dissolved,—the crown becomes entitled to receive the appropriation in its place (*a*). But, *nota bene*, as regards unclaimed dividends due *from* a company,—The Statute of Limitations begins to run as from the date of the declaration of the dividend, and the company is not a trustee of such dividend for the shareholder entitled thereto,—So that, after twenty years (*b*), —the right of the shareholder to receive it will be barred, —*Scil.*, unless some special portion of the assets is appropriated for the unclaimed dividend, and notice of the appropriation has been given to the shareholder.

How and when creditors may call upon the beneficiaries to refund assets.

The effect of an executor administering personal estate under the direction of the Court (or administering it, after advertising for creditors and claimants, under s. 29 of the 22 & 23 Vict. c. 35) is,—To protect him *personally* against any claims (of which he has no notice) thereafter brought forward, by such creditors or claimants (including next of kin (*c*)); and they are (all of them) left to pursue their remedies against the distributees of the estate (*d*). But, if the executor has administered the estate neither in the one nor in the other of those two ways, then (just like a liquidator in a voluntary winding up (*e*)) he remains *personally* liable to any unpaid creditor,—who may accordingly sue him,—in respect of and to the extent of the assets received: In which case, the executor (if he have duly administered) will be entitled to call upon the distributees of the estate to refund (*f*). The creditor may, however, proceed also against these distri-

(*z*) *Bartlett* v. *Charles*, 45 Ch. Div. 458.
(*a*) *In re Higginson*, 1899, 1 Q. B. 325.
(*b*) *In re Artisans' Land Corporation*, 1904, 1 Ch. 796.
(*c*) *Newton* v. *Sherry*, 1 C. P. D. 246.
(*d*) *Doughty* v. *Townson*, 43 Ch. Div. 1.
(*e*) *Pulsford* v. *Devenish*, 1903, 2 Ch. 625.
(*f*) *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18.

butees (*g*),—this latter remedy being a purely equitable one; and the Court will not enforce it, if there are circumstances rendering it inequitable to do so (*h*).

Creditors to be paid,—before beneficiaries receive anything.

Legatees and devisees are, of course, postponed to creditors. But (subject to the prior rights of the creditors) the legatees and devisees are respectively preferred *inter se* to the next of kin and to the heir-at-law of the testator,—the residuary *legatees* being the least favoured, although residuary *devisees* rank on the same level as other devisees; and the Courts have established, as between the different properties of the testator and the beneficiaries entitled thereto respectively, the following order of liability to the debts (*i*), that is to say:—

Order of liability to debts of the different properties of testator,—as between such properties themselves only.

(1) The general personal estate, not bequeathed at all or bequeathed by way of residue only (including appointment property which is not otherwise appointed save under a gift of residue (*k*));
(2) Real estate devised upon trust for the payment of debts;
(3) Real estate descended;
(4) Real estate devised (whether specifically or by way of residue), and charged with the payment of debts;
(5) General pecuniary legacies (including annuities and demonstrative legacies which have become general);
(6) Specific legacies (including demonstrative legacies that have remained demonstrative); and real estate devised (specifically or by way of residue), and not charged with debts,—a trust of personal estate arising *dehors* the will being deemed a legacy,—specific (*l*) or general (*m*), as the case may be;

(*g*) *Hunter* v. *Young*, 4 Exch. Div. 256.
(*h*) *Blake* v. *Gale*, 32 Ch Div. 571.
(*i*) *Galton* v. *Hancock*, 2 Atk. 427.
(*k*) *Williams* v. *Williams*, 1900, 1 Ch. 155.
(*l*) *In re Maddock*, 1902, 2 Ch. 220.
(*m*) *Irvine* v. *Sullivan*, L. R. 8 Eq. 673.

(7) Personalty or realty subject to a general power of appointment, if and so far as the power has been actually and specifically exercised (*n*), either by deed (in favour of volunteers) or by will; and
(8) Paraphernalia of widow.

(1) The general personal estate,—primary liability of.

The general personal estate is first liable,—as well for the debts, as for the costs of administration and the like; and it may also be liable for the damages recoverable on a breach of the testator's covenant to expend money on some specifically devised property, in exoneration of the devisee thereof(*o*),—the covenant not being one of the ordinary covenants incident to the relation of landlord and tenant (*p*).

Question,—What exonerates the personalty?

The general personal estate may, however, have been exonerated by the testator himself from its primary liability; and if the testator has (*e.g.*) appropriated any specific part of his personal estate for the payment of his debts, and has also disposed of his general residuary personal estate,—The part so appropriated will be *primarily* liable to the payment of the debts (in exoneration of the general residuary estate),—Although, if the exonerated residue should lapse (*q*), or if any part thereof should lapse (*r*), the exoneration will cease to the extent of the lapse. And a testator will occasionally create a particular residue for the payment of his debts, and a general residue for the payment of his legacies (*s*). But, if a testator will exonerate his personal estate from its primary liability, he must show an intention, not only to charge his real estate, but also to discharge his personal estate; and neither a general charge of the debts upon the real estate (*t*), nor an express trust for the payment of the

Answer,—There must be both a discharge of the personalty and a charge of the realty.

(*n*) *Darley* v. *Hodgson*, 1899, 1 Ch. 666.
(*o*) *Eccles* v. *Mills*, 1898, A. C. 360.
(*p*) *Hawkins* v. *Hawkins*, 13 Ch. D. 470.
(*q*) *Kilford* v. *Blaney*, 31 Ch. Div. 56.
(*r*) *Dacre* v. *Patrickson*, 1 Dr. & Sm. 182.
(*s*) *Higgins* v. *Dawson*, 1902, A. C. 1.
(*t*) *Banks* v. *Busbridge*, 1905, 1 Ch. 547.

debts out of the real estate (*u*), will be sufficient (of itself alone) to exonerate the personal estate,—but if the personal estate is at the same time given as a whole to some legatee, that will be sufficient, the personal estate, when so given, being like *a specific legacy* given (*x*).

Exoneration of general personal estate, from mortgage debts, otherwise than under the statute 17 & 18 Vict. c. 113 (Locke King's Act), and the amending Acts.

The primary liability of the general personal estate to pay the debts used to extend to the mortgage debts,—until, by Locke King's Act (*y*), the liability for the mortgage debts was shifted on to the mortgaged estate itself.

Locke King's Act enacted, that "when any person shall, *after the 1st January*, 1855, die seised of or entitled to any estate or interest" (not being, of course, an estate tail (*z*)) "in *any lands or other hereditaments*, which shall (at the time of his death) be charged with the payment of any sum or sums of money by way of *mortgage*,—and such person shall not *have signified any contrary or other intention*,—The heir or devisee to whom the lands shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the *personal* estate (or out of any other real estate), but the lands so charged shall (*as between the different persons claiming through or under the deceased person* (*a*)) be primarily liable for the payment of all the mortgage debts with which the same are charged,—*every part thereof bearing its proportionate part of the mortgage debt*.

(1) State of the law, before Locke King's Acts: Personalty was primarily liable,—unless mortgaged estate devised *cum onere*, or personalty exonerated.

According to the law as it existed prior to the Act,—The heir or devisee was *primâ facie* entitled (in respect of the descended or devised realty) to have the mortgage debt (upon it) paid out of the personal estate; and where the debt had been contracted by the deceased person himself, that rule was reasonable enough,—for what had gone into his personal estate might fairly enough come out of it again; but otherwise the rule was unfair,—and some-

(*u*) *Brydges* v. *Phillips*, 6 Ves. 750.
(*x*) *Broadbent* v. *Barrow*, 31 Ch. Div. 113.
(*y*) 17 & 18 Vict. c. 113.
(*z*) *Anthony* v. *Anthony*, 1893, 3 Ch. 498.
(*a*) *Dacre* v. *Patrickson*, 1 Dr. & Sm. 186.

times extravagantly unfair (*b*),—towards the personal estate: But the mortgaged estate might (by express words) have been devised *cum onere;* and if the mortgage debt was the debt of a previous owner of the mortgaged estate,—in other words, was an *ancestral mortgage,*—the mortgaged estate was the primary fund for its payment (*c*),—Excepting that, if the deceased had adopted the ancestral debt as his own debt, the ordinary rule applied,—Only such an adoption was very difficult to prove, the owner's adoption of the debt *for a particular purpose* not being deemed an adoption of it for this purpose also (*d*). However, now, by the effect of the Act, every mortgage is to be treated as an *ancestral mortgage,*—unless a contrary intention is expressed. But a purchaser for value is, of course, entitled to have the mortgages on the land comprised in his purchase discharged out of the purchase money,—and he is not the less entitled to that, merely because he is also a devisee (*e*).

Mortgaged estate was primary fund, when mortgage was an ancestral debt,—unless it had been adopted as a personal debt.

(2) State of the law, since Locke King's Acts.

Copyholds lands as well as freehold lands are within the Act; but leaseholds were not within the Act; and accordingly, the amending Act of 1877 (*f*) was passed, for the purpose of bringing leaseholds within it,—the amending Act applying to any testator or intestate who dies after the 31st December, 1877 (*g*).

Copyholds and freeholds are within the principal Act.

Leaseholds are within the amending Act, 1877.

The words "sums by way of *mortgage,*" occurring in the principal Act, apply only to defined and direct charges on specified estates,—but include equitable mortgages (*h*), estate duty charges (*i*), and also the charge to which a judgment creditor, on the actual delivery of the lands in execution, becomes entitled (*k*). They used not to include the *vendor's lien* for unpaid purchase-money (*l*),—but,

Vendor's lien is within the

(*b*) *Coppin* v. *Coppin*, 2 P. Wms. 240.
(*c*) *Scott* v. *Beecher*, 5 Mad. 96.
(*d*) *Evelyn* v. *Evelyn*, 2 P. Wms. 659.
(*e*) *In re Wilson*, 1908, 1 Ch. 839.
(*f*) 40 & 41 Vict. c. 34.
(*g*) *Lowther* v. *Fraser*, 1904, 1 Ch. 111.
(*h*) *Pembroke* v. *Friend*, 1 J. & H. 132.
(*i*) *In re Bowerman*, 1908, 2 Ch. 340.
(*k*) *Anthony* v. *Anthony*, 1892, 1 Ch. 450.
(*l*) *Hood* v. *Hood*, 5 W. R. 747.

amending Acts, 1867 (testators) and 1877 (intestates).

by force of the amending Acts of 1867 and 1877 (*m*), the word "mortgage" now extends to include a lien (in the case not only of *testators*, but also of *intestates*). Also, divers other charges (of defined amount), although arising by implication of equity only, are now deemed to fall within the Acts (*n*).

Where a testator was one of several partners,—and he made a mortgage of his own private land for a partnership debt,—That was not regarded (for the purposes of Locke King's Acts) as a mortgage debt of the testator (*o*), —at least, where the partnership assets were suffieient to answer all the partnership debts (*p*). Also, a liability to expend money in buildings (on the specific land devised or descended) is not a liability falling within the Acts (*q*).

"Contrary or other intention" in principal Act,—it is sufficient to charge the personal, without at the same time discharging the real, estate.

Upon the question, what is a "*contrary or other intention*" within the meaning of Locke King's Acts,—There need not be both a discharge of the real estate and a charge of the personal estate (*r*), but it is sufficient to show a discharge of the real estate (*s*): And, therefore, where the *personal* estate was bequeathed on trust to pay,—or subject to the payment of,—the debts, that used to be sufficient; but, now, and as regards all testators who die after the 31st day of December, 1867, the contrary intention can only be declared, by words expressly or by necessary implication referring to the *mortgage debts* (*t*). Also, the "contrary intention," even where it is shown, may operate as only a *partial* exoneration of the mortgaged estate (*u*).

Liability of executors for mortgage debts of testator,—and

Locke King's Acts do not affect the rights of the mortgagees themselves: Executors are, therefore, liable to provide (out of the assets of their testator) for all the

(*m*) 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34.
(*n*) *Price* v. *John*, 1905, 1 Ch. 744.
(*o*) *Ritson* v. *Ritson*, 1899, 1 Ch. 128.
(*p*) *Brettell* v. *Holland*, 1907, 2 Ch. 88.
(*q*) *Sprake* v. *Day*, 1898, 2 Ch. 510.
(*r*) *Woolstencroft* v. *Woolstencroft*, 2 De G. F. & J. 347.
(*s*) *Eno* v. *Tatham*, 11 W. R. 475.
(*t*) *Valpy* v. *Valpy*, 1906, 1 Ch. 531.
(*u*) *In re Bird, Hunt* v. *Thorn*, 1909, 1 Ch. 287.

mortgage debts, made by the testator himself or for which he is personally liable; and apparently, no statute of limitations will (without other circumstances combining therewith) protect the executors from their liability in this respect (*x*). But the executors may (as regards a mortgage debt which they have left unprovided for) be protected by the Statutes of Limitations *coupled with acquiescence or with laches on the mortgagee's part*,—it being only right (in such a case), that the executors should be protected against the mortgagee's claim,—Because, where an executor, with notice of a *debt* (*y*) [as distinguished from a mere *liability* (*z*)], parts with all the assets amongst the beneficiaries, and leaves the debt unprovided for,—he has no right himself to afterwards call upon the beneficiaries to refund: Therefore, where there has been laches or acquiescence on the part of the mortgagee,—whereby the executor has been lulled into departing from his strict duty,—the Court will protect the executor, leaving the mortgagee to proceed against the distributees for an order to refund (*a*).

their protection against same after distribution of estate.

Liability of distributees, to refund towards paying such mortgage debts.

An executor is not entitled (at least in the general case) to appropriate (before distributing the estate) any part of the assets, to meet a liability of the testator's estate that is merely contingent,—a liability (*e.g.*) which will only arise, failing the person primarily liable (as, *e.g.*, the assignee of a lease of which the testator was the lessee (*b*)): Nor may a lessor in general, require any such appropriation to be made (*c*),—although where the estate is insolvent, some such appropriation would be expedient enough (*d*).

Lands devised upon trust to pay the debts are liable next after the residuary personalty; and next after them, come real estates which have descended to the heir; and then come (fourth in order) real estates (devised specifically or by way of residue) *charged* with the debts.

(2) Lands expressly devised for payment of debts, equitable assets.

(*x*) *Bowles* v. *Hyatt*, 38 Ch. Div. 609.
(*y*) *Whittaker* v. *Kershaw*, 45 Ch. Div. 320.
(*z*) *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18.
(*a*) *Blake* v. *Gale*, 32 Ch. D. 571.
(*b*) *Mellor* v. *South Australia*, 1907, 1 Ch. 72.
(*c*) *King* v. *Malcott*, 9 Ha. 692.
(*d*) *Fuller* v. *McMahon*, 1900, 1 Ch. 173.

(3) Realty descended, legal assets.
(4) Realty devised charged with debts, equitable assets.

But if (by reason of lapse) the heir takes any of the land devised which is charged with the debts, the land so charged remains in the same order of liability as if it had not lapsed (*e*); and since the Inheritance Act, 1833 (3 & 4 Will. IV c. 106), when land is devised to the heir, he takes it as devisee,—and accordingly, is liable as such (*f*).

(5) General pecuniary legacies.
(6) Specific legacies and devises.

General pecuniary legacies are next liable,—By which it is meant, that the proportion of the personal estate, which the executor would (but for the debts) have set apart to meet these legacies, is next liable; and next after these come the specific legacies (*g*), the specific devises (*h*), and the residuary devises (*i*),—All which latter are (*inter se*) liable *pro ratâ*, to contribute to the payment of the debts; and the Land Transfer Act, 1897 (*k*), has made no difference in that (*l*),—nor, in fact, in any other of these rules of administration (*m*). However, any legacies or portions, charged on such devises, do not contribute at all (*n*). And, *nota bene*, all such legacies or portions,—and the mortgages (if any) which may have been created in order to raise them (*o*), are (*inter se*) payable on a level.

(7) Property over which testator has exercised a general power of appointment.

Real or personal property over which the testator has a *general* power of appointment, which he has actually and *specifically* exercised,—whether by deed (*in favour of volunteers*) or by will,—is the property next applicable for the payment of the debts; and the appointed property, *to the extent that it is appointed* (*p*), will vest in the appointor's executors as part of his assets,—So as to be subject to the demands of his creditors,—in preference to the claims of the appointees (*q*): But, for this purpose, the testator must have shown a clear intention to make

(*e*) *Stead* v. *Hardaker*, L. R. 15 Eq. 175.
(*f*) *Owen* v. *Gibbons*, 1902, 1 Ch. 636.
(*g*) *Fielding* v. *Preston*, 1 De G. & J. 438.
(*h*) *Mirehouse* v. *Scaife*, 2 My. & Cr. 695.
(*i*) *Lancefield* v. *Iggulden*, L. R. 10 Ch. App. 136.
(*k*) 60 & 61 Vict. c. 65, ss. 1, 2.
(*l*) *Kempster* v. *Kempster*, 1906, 1 Ch. 446.
(*m*) *Trewby* v. *Balls*, 1909, 1 Ch. 791.
(*n*) *Saunders-Davies* v. *Saunders-Davies*, 34 Ch. Div. 482.
(*o*) *Nightingale* v. *Reynolds*, 1903, 2 Ch. 236.
(*p*) *Darley* v. *Hodgson*, 1899, 1 Ch. 666.
(*q*) *Sperling* v. *Rochfort*, 16 Ch. Div. 18.

the property his own to all intents (*r*),—and so as that any lapsed part of it would go to his own next of kin in preference to the persons entitled in default (*s*).

The mere appointment of an executor will not amount to the exercise of a general power of appointment (*t*); but if the testator gives legacies, and his own proper estate is insufficient for the payment of such legacies in full after all his debts are paid, the simple appointment of an executor will operate to exercise the general power of appointment, to the extent required for the payment of the debts and of the legacies (*u*).

Also, *nota bene*, all the above rules are (or may be) applicable, whether the will (whereby the power of appointment is or is not executed) be an English will or be a foreign will admitted to probate here (*x*).

(8) Widow's paraphernalia.

Last in the order of liability come the paraphernalia of the testator's widow,—She being preferred to all legatees and devisees,—and ranking, in fact, next after the creditors of the deceased,—*Scil.*, because paraphernalia, although liable to a husband's debts, cannot, by his *will* alone, be disposed away from the wife.

Retainer by executor,—its origin and limits.

In the application of the testator's assets to the payment of his debts in the order above exemplified, the testator's intention is supposed to be the guide; but as regards the singularity of the EXECUTOR'S RETAINER, it is uncertain, whether the right depends upon intention at all,—the right arising, simply, from the executor's inability to sue himself (in a Court of law) for the recovery of his own debt (*y*), and existing in the case of legal assets only (*z*).

But whatever the origin of the right, retainer is only as against creditors in an equal degree with the

(*r*) *Thurston* v. *Evons*, 32 Ch. Div. 508.
(*s*) *Shaw* v. *Marten*, 1902, 1 Ch. 314.
(*t*) *Stanton* v. *Lambert*, 39 Ch. D. 626.
(*u*) *In re Seabrook, Gray* v. *Baddeley*, 1911, 1 Ch. 151, following *In re Davies's Trusts*, L. R. 13 Eq. 163.
(*x*) *In re Pryce, Lawford* v. *Pryce*, 1911, 2 Ch. 286.
(*y*) *International Marine Co.* v. *Hawes*, 29 Ch. Div. 934.
(*z*) *Thompson* v. *Bennett*, 6 Ch. Div. 739.

executor (*a*),—And if, therefore, the executor is a simple contract creditor, he cannot (or, at least, it was supposed, he could not) retain as against specialty creditors (not even after Hinde Palmer's Act (*b*)),—nor yet as against judgment creditors (*c*); but inasmuch as he can lawfully pay a simple contract debt before a specialty debt of which (at the time) he has no notice (*d*), so he can also validly pay himself (*i.e.*, retain his own debt), before a specialty of which he has no notice (*e*). And, *semble*, the notice would not, in either case, now matter (*f*).

An executor may retain in respect of a debt of which he is but a trustee (*g*), or co-trustee (*h*). Also, the right of retainer exists in respect of a joint debt (*i*),—or an equitable debt (*k*),—or a statute-barred debt (*l*); and one executor may retain out of a balance in the hands of the executors generally (*m*).

The right of retainer is not lost by a decree in an administration action (*n*),—nor by payment of the fund into Court to the credit of that action (*o*); nor by payment to an official receiver in a small insolvent administration-proceeding (*p*); and the right exists in favour of a married woman (executrix), in respect of moneys lent by her to the deceased,—although such deceased should have been her own husband,—and even where the loan was made to him for the purposes of his business (*q*).

An administrator (equally with an executor) used to be entitled to the right,—the retainer (although being a pre-

(*a*) *Laver* v. *Botham*, 1895, 1 Q. B. 59.
(*b*) *Calver* v. *Laxton*, 31 Ch. Div. 440.
(*c*) *Crawter* v. *Marvin*, 1905, 2 Ch. 490.
(*d*) *Harman* v. *Harman*, 2 Show. 492.
(*e*) *Wingfield* v. *Erskine*, 1898, 2 Ch. 562.
(*f*) *Robbins* v. *Alexander*, 1906, 2 Ch. 584.
(*g*) *Tweedie* v. *Haywood*, 1901, 1 Ch. 221.
(*h*) *International Marine Co.* v. *Hawes*, *supra*.
(*i*) *Crowder* v. *Stewart*, 16 Ch. Div. 368.
(*k*) *Morris* v. *Morris*, L. R. 10 Ch. App. 68.
(*l*) *Stahlschmidt* v. *Lett*, 1 Sm. & G. 415.
(*m*) *Kent* v. *Pickering*, 2 Keen, 1.
(*n*) *Campbell* v. *Campbell*, 16 Ch. Div. 198.
(*o*) *Richmond* v. *White*, 12 Ch. Div. 361.
(*p*) *In re Rhoades*, 1899, 2 Q. B. 347.
(*q*) *Crawford* v. *May*, 45 Ch. Div. 499.

ference) not being an "UNDUE *preference*" (*r*); but an administrator (*administrating as a creditor simply*) is not now entitled to retain, the word "*unduly*" (in the administration bond of such creditor) being now left out.

Retainer *in specie*.

Retainer may even be of the estate *in specie* (*s*),—For, if an executor pays any debts (or redeems any pledges) of the deceased, *with his* (*the executor's*) *own moneys*, he will be entitled to retain an equivalent part of the estate *in specie* (*t*). And an executor who claims only as having been a surety for the deceased, may retain,—the right of retainer, in this last case, being only in respect of debts (*u*), and not in respect of mere liabilities (*x*).

No retainer in respect of a mere liability; or except out of assets come to the executor's own hands.

An executor cannot, of course, retain out of moneys which he holds as a trustee only for the estate of his testator (*y*); and he may otherwise be deprived of the full benefit of his retainer,—as where (*e.g.*) he has assented to a composition (*z*). Also, an executor cannot retain out of the assets which are recovered or received by a receiver appointed in an administration action (*a*); but a receiver will not be appointed, merely for the purpose of *defeating* the right of retainer (*b*),—just as, conversely, money in Court will not be paid out to the executor for the purpose of *giving* him the right of retainer (*c*). Also, the right of retainer does not exist, if the estate is administered in the Bankruptcy Division; and it is lost, if the administration (pending in the Chancery Division) is transferred into the Bankruptcy Division (*d*).

No retainer in bankruptcy administration.

The executor's retainer is limited to such assets as come to his hands *during his lifetime;* but if the executor asserts

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(*r*) *Davies* v. *Parry*, 1899, 1 Ch. 602.
(*s*) *In re Gilbert*, 1898, 1 Q. B. 282.
(*t*) Dyer, 2*a*, 187*b*.
(*u*) *Turner* v. *Watson*, 1896, 1 Ch. 925.
(*x*) *Lee* v. *Binns*, 1896, 2 Ch. 584.
(*y*) *Talbot* v. *Frere*, 9 Ch. Div. 568.
(*z*) *Birt* v. *Birt*, 22 Ch. Div. 604.
(*a*) *Pulman* v. *Meadows*, 1901, 1 Ch. 233.
(*b*) *Molony* v. *Brooke*, 45 Ch. Div. 569.
(*c*) *Trevor* v. *Hutchins*, 1896, 1 Ch. 844.
(*d*) *Jones* v. *Williams*, 36 Ch. Div. 573.

the right in his lifetime, and then dies while the retainer is incomplete, his executor may afterwards insist upon the right (*e*). Also, the right of retainer (where it exists) extends to include damages for breach of contract, when such damages are measurable (*f*); but where A. (or his estate) is liable to B. for damages (say, in respect of A.'s neglect of repairs), and B. owes A. (or A.'s estate) any debt (say, in respect of moneys lent),—and the debt is statute-barred, the damages may not be applied (*Scil.*, retained) in satisfaction of the debt (*g*).

No retainer by heir or devisee,—in the general case, at least.

An heir-at-law or devisee has no retainer out of the lands descending or devised,—except, possibly, in respect of a specialty debt in which the heirs are specially bound (*h*); Also, the better opinion is, that the Land Transfer Act, 1897, vesting the real estates of a deceased debtor in his legal personal representative, has not extended the right of retainer to these real estates (*i*).

Retainer,—will sometimes (but only sometimes) be *compulsory*.

In a case where Brown was the legal personal representative of an estate X., and also of an estate Z.; and X. was indebted to Z.,—Brown was *entitled*, and also *compellable* to retain out of X. for the benefit of Z. (*k*); but where the debt owing by X. to Z. had arisen in respect of a breach of trust (the deceased owner of X. being the delinquent trustee of Z.),—and Brown was the legal personal representative of X.,—and was (as such) entitled to accept (if he chose to accept) the trust of Z., *but was also free to decline to accept that trust*, and did decline it,—In such a case, Brown was not compellable to retain out of X. for the benefit of Z. (*l*).

Wilful default,—executor's liability for.

The limit of the executor's liability is, in general, the assets which have come to his hands (or to the hands

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(*e*) *Norton* v. *Compton*, 30 Ch. Div. 15.
(*f*) *Loane* v. *Casey*, 2 W. Bl. 965.
(*g*) *Dingle* v. *Coppen*, 1899, 1 Ch. 726.
(*h*) *Davidson* v. *Illidge*, 27 Ch. Div. 478.
(*i*) *Holder* v. *Williams*, 1904, 1 Ch. 52.
(*k*) *Sander* v. *Heathfield*, L. R. 19 Eq. 21.
(*l*) *Ridley* v. *Ridley*, 1904, 2 Ch. 774.

of any one on his behalf); but property is deemed to have come to his hands if it is money owing by himself to the estate (*m*),—or, *semble*, if it was his duty to have retained the amount thereof (as a debt owing to the estate) out of the share of the estate coming to any debtor-legatee (*n*),—*Scil.*, because he is liable for what (but for his own *wilful default*) he might have received (*o*). It is by no means easy, however, to prove "wilful default" against an executor (*p*),—that being something more than a mere breach of trust (*q*); and in order to charge him with wilful default, the pleadings must contain an allegation of the wilful default (specifying one instance thereof at the least),—And then, if the allegation has not been disproved at the hearing, but merely the ordinary administration judgment taken, that judgment may afterwards be added to,—*Scil.*, whenever the wilful default is made to appear (*r*).

Accountability of executors after distribution of estate.

Where the residuary personal estate is bequeathed to several legatees, *contingently on their attaining respectively their ages of twenty-one years*,—It frequently happens, that the executors pay some of the legatees their shares of the residue (*Scil.*, upon their respectively attaining their ages of twenty-one years), and retain in their hands the remaining shares of the residue (*Scil.*, until the other legatees successively attain their ages of twenty-one years): and if (after such partial distribution of the residue) the unpaid residuary legatees (or some of them) institute proceedings against the executors, for the administration of the estate,—The rule is, that the costs of the action must, in general, be borne by the shares coming to the plaintiffs, and by those shares exclusively; but if it appears, that the executors have made the distribution upon an erroneous principle,—so that their accounts are erroneous,—then the costs of the action will not be thrown

(*m*) *Ingle* v. *Richards*, 28 Beav. 366.
(*n*) *Taylor* v. *Wade*, 1894, 1 Ch. 671.
(*o*) *Job* v. *Job*, 6 Ch. Div. 562.
(*p*) *Cooke* v. *Stevens*, 1898, 1 Ch. 162.
(*q*) *In re Wrightson*, 1908, 1 Ch. 789.
(*r*) *Smith* v. *Armitage*, 24 Ch. Div. 727.

exclusively upon the shares coming to the plaintiffs, but will be declared to be payable out of the entire residuary estate,—*So as to make the executors personally liable for the proportion of such costs which would have been paid out of the shares that have been distributed, if such shares had not been distributed* (*s*),—but the paid residuary legatees are *not* called upon (in such a case) to refund anything. Also, generally, where one of several residuary legatees (or next of kin) has received his share of the estate in full, and there is subsequently a diminution of the estate remaining undistributed,—whether the diminution arises from some devastavit (*t*), or from any fortuitous event (*u*),—the unpaid residuary legatees cannot call on the paid residuary legatee to refund; and an appropriation is (for this purpose) on the same footing as an actual payment (*x*).

What time bars the right to administration.

Actions for the administration of the estates of deceased persons can only be instituted by persons whose claims to recover are not barred by any statute of limitations,—Therefore, in the case of a creditor by simple contract, only within six years from the time that his debt was demandable (*y*); and in the case of a judgment creditor,—whether the judgment is a charge on the lands or not, only within twelve years (*z*); and in the case of legatees, only within twelve years after a "*present right to receive*" their legacies (*a*) (*i.e.*, to bring an action at law for them (*b*)) has accrued,—and there are the like limits in the case of an intestate's estate (*c*). The liability of the estate may, however, be kept alive,—*Scil.*, by a part payment or written acknowledgment on the part of the executors; and (as regards the personal estate (*d*),—although

(*s*) *Frere* v. *Winslow*, 45 Ch. Div. 249.
(*t*) *Peterson* v. *Peterson*, L. R. 3 Eq. 111.
(*u*) *Fenwick* v. *Clarke*, 4 De G. F. & J. 240.
(*x*) *Dowsett* v. *Culver*, 1892, 1 Ch. 210.
(*y*) *Barnes* v. *Glenton*, 1899, 1 Q. B. 885.
(*z*) *Jay* v. *Johnstone*, 1893, 1 Q. B. 189.
(*a*) *Evans* v. *Moore*, 1891, 3 Ch. 119.
(*b*) *McLaughlin* v. *Penny*, 1906, 1 Ch. 265.
(*c*) 23 & 24 Vict. c. 38, s. 13; *Sly* v. *Blake*, 29 Ch. D. 964.
(*d*) *Dick* v. *Fraser*, 1897, 2 Ch. 181.

not as regards also the real estate (*e*)),—by the written acknowledgment of any one even of the executors.

Miscellaneous estates,—administration of.

An illegal trust,—although (where executed in part) it is not revocable (by the settlor, or by his legal personal representative), and remains good therefore as between the trustee and the *cestui que trust* (*f*),—will not be *administered* by the Court (*g*). And as regards a trade union,—being one which is illegal by the common law, and which is only made legal by the Trade Union Acts (*h*),—the Court may not administer,—but may make a declaration (*i*). And as regards the estates of a convicted felon,—*Scil.*, his fee simple estates, and not also his estates tail (*k*),—the administration of these is now committed to an administrator appointed under the Act 33 & 34 Vict. c. 23 (*l*). And in respect of the estates of officers and soldiers dying in actual service, special provisions have now been made by the Regimental Debts Act, 1893 (*m*).

Property settled subject to mortgage,—adjustment of rights between tenant for life and remainderman.

Where any property is settled subject to some mortgage thereon, the rule is, that the tenant for life must, out of the rents and profits or income, keep down the interest on the mortgage (*n*). And this rule extends to include a legacy charged on the inheritance (*o*); and it includes also a licence-compensation charge (*p*), an estate duty charge (*q*), and a street-improvement charge (*r*),—and, in fact, every paramount charge of a (more or less) permanent nature (*s*): Also, when two estates are included in one devise, and the charge is on one only of the de-

(*e*) *Astbury* v. *Astbury*, 1898, 2 Ch. 111.
(*f*) *Thomson* v. *Thomson*, 7 Ves. 470.
(*g*) *Barclay* v. *Pearson*, 1893, 2 Ch. 154.
(*h*) *Russell* v. *Amalgamated Carpenters*, 1910, 1 K. B. 506.
(*i*) *Cope* v. *Crossingham*, 1908, 2 Ch. 624; 1909, 2 Ch. 148; *Osborne's case*, 1911, 1 Ch. 540.
(*k*) *In re Gaskell and Walters*, 1906, 2 Ch. 1.
(*l*) *Carr* v. *Anderson*, 1903, 2 Ch. 279.
(*m*) 56 & 57 Vict. c. 5.
(*n*) *Bute (Marquess)* v. *Ryder*, 27 Ch. D. 196.
(*o*) *Makings* v. *Makings*, 1 De G. F. & J. 355.
(*p*) *Smith* v. *Dodsworth*, 1906, 1 Ch. 799.
(*q*) *Wynter* v. *Orlebar*, 1908, 1 Ch. 136.
(*r*) *Scrivener* v. *Aldridge*, 1907, 1 Ch. 67.
(*s*) *Honywood* v. *Honywood*, 1902, 1 Ch. 347.

vised estates, and the rents and profits of that estate are insufficient to pay the interest on the charge, the rents and profits of the other estate must (ordinarily) come in aid of the charged estate (*t*). And if the mortgage incumbrance or charge is an annuity (terminable with the life of the annuitant), it must be valued or capitalised, —So that if the tenant for life pays the whole annuity (yearly as it accrues due), he will be entitled (as against the remainderman) to a charge on the settled property for the amount and amounts so paid (*u*); and conversely, the remainderman, where he is saddled with any arrears of the life-tenant (*x*): But, *nota bene*, in all these cases, the annuity is a debt of the testator or settlor himself, —and (as such) is payable out of his estate before the beneficiaries acquire any title at all. Of course, the tenant for life (entitled to such a charge) will not be entitled (during his own life) to any interest on the charge (*y*); nor to realise the charge by foreclosure of the estate,—but only to realise it by the sale of some part of the estate (*z*): Also, *nota bene*, there are many other cases in which the like equitable adjustments will be made,—and the principle of the thing has (in some instances) been recognised and adopted by the Legislature even (*a*).

(*t*) *Frewen* v. *Law Life Assurance Society*, 1896, 2 Ch. 511.
(*u*) *Townson* v. *Harrison*, 43 Ch. D. 55.
(*x*) *Roe* v. *Pogson*, 2 Madd. 457.
(*y*) *Howe* v. *Kingscote*, 1903, 2 Ch. 69.
(*z*) *Darke* v. *Williamson*, 25 Beav. 622.
(*a*) *Rowe* v. *Gough*, 1909, A. C. 64 (*Irish Land*); and 8 Edw. VII. c. 28, ss. 15, 16 (*English Land*).

CHAPTER XV.

MARSHALLING ASSETS.

THE order in which the divers assets of the deceased are stated, in the preceding chapter, to be applicable for the payment of the debts, regulates the administration of such assets *only as between or among the testator's own representatives devisees and legatees*,—and does not affect the rights of the *creditors* themselves, who may resort (indiscriminately) to all or any of the funds to which their claims extend. And it might have happened, therefore (in times preceding the 3 & 4 Will. IV. c. 104), that a creditor having a right to proceed against two or more funds, proceeded against the fund which was the *only* resource of some other creditor,—and equity would, in that case, have held, that the creditor who had the two funds, should not (by resorting to the fund which was the *only* resource of the other creditor) *disappoint that other:* And accordingly, the Court permitted the creditor who had but the one fund, to stand (*to the extent of his fund*) in the place of the other creditor against the other fund,—the object of the Court being, to see that *all the creditors were satisfied*, so far as (by any arrangement consistent with the nature of the several claims) the assets permitted (*a*),—And this was called the "*marshalling of assets.*" The general principle of marshalling.

I. *Marshalling as between Creditors.*—Simple contract creditors had no claim originally against the real assets,—unless where these assets were charged with (or were devised upon trust for) the payment of the debts; and in the absence, therefore, of such a charge or devise, specialty creditors might have resorted to the personal estate, *in priority to*,—and to the real assets *in exclusion of*,— (1) Marshalling as between creditors.

(*a*) *Aldrich* v. *Cooper*, 8 Ves. 382.

simple contract creditors: Therefore, equity compelled the specialty creditors to resort in the first place to the real assets—so as to leave the personalty for the simple contract creditors; and if the specialty creditors had exhausted the personal assets, the simple contract creditors were put in their place, against the real assets, *as far as the specialty creditors had exhausted the personal assets* (*b*). Also, if the vendor of an estate (the contract for which had not been completed by the purchasing testator in his lifetime) was afterwards paid his purchase-money out of the personal assets of the testator, the simple contract creditors were put in the vendor's place *to the extent of that vendor's lien on the estate sold* and as against the devisee of that estate (*c*).

Marshalling of securities,—principle of;

Ia. *Marshalling as between secured creditors.*—The doctrine of marshalling as between creditors was enforced only as between the creditors of the same debtor,—sometimes called the "*common debtor*" (*d*); and in the "*marshalling of securities*," the Court required, that the one creditor should have had two *charges*, and the other creditor but one charge on the property: And accordingly, in *Webb* v. *Smith* (*e*), where the defendant (an auctioneer) had a lien on the sale-proceeds of a brewery, in respect of a certain debt which was owing to him; and he sold certain furniture, and paid over the whole sale-proceeds thereof to the owner of the furniture,—leaving his lien on the sale-proceeds of the brewery unreduced, —Whereby the plaintiff, who had a charge on the brewery subsequent to the defendant's lien thereon, lost the benefit which would have accrued to him (the plaintiff) if the defendant had applied the proceeds of sale of the furniture towards the discharge of his (the defendant's) lien, —The Court said, that the plaintiff had no right to blame the defendant for that,—*Scil.*, because the defendant had only one lien (and not two liens) for his debt.

also, general rules regarding.

And generally, as regards the marshalling of securities,

(*b*) *Aldrich* v. *Cooper*, *supra*.
(*c*) *Selby* v. *Selby*, 4 Russ. 336.
(*d*) *Ex parte Kendall*, 17 Ves. 520.
(*e*) 30 Ch. Div. 192.

the rules were (and are) as stated by Lord Hardwicke in *Lanoy* v. *Duke of Athole* (*f*), as follows, that is to say:—Firstly, if a person having two real estates mortgages both estates to A., and afterwards one only of the estates to B.,—The Court,—whether B. had notice of A.'s mortgage or not,—directs A. (but always without prejudice to A.) to realise his debt out of that estate which is *not* in mortgage to B.,—So as to leave the one estate which is in mortgage to B. to satisfy B., so far as it goes;

But, Secondly, the marshalling of securities as between A. and B., is not enforceable by B. to the prejudice of C. (a third person (*g*)).

All which rules are applicable also as against a surety, to whom (on payment of the debt) A. may have assigned his security (*h*). Moreover, the Court will apply these rules of marshalling securities, in favour also of the divers volunteers, who (whether as devisees or otherwise) claim title through or under the mortgagor: That is to say,—Where an estate A. is primarily liable for part of a mortgage debt; and that estate and also another estate B. (whether of the same testator (*i*) or of the same intestate (*k*)) are *pro ratâ* liable for the remaining part of the mortgage debt,—If one of the estates is sold, and the net sale-proceeds are applied in discharging the entire mortgage debt,—In such a case, the Court interposes, and (as between the respective beneficiaries who, before the sale, were entitled to the A. estate and to the B. estate respectively) arranges the matter equitably, by a rateable apportionment of that part of the mortgage debt which was charged on both the estates: And seeing that A. must exclusively bear the whole of that part of the mortgage debt for which A. was primarily liable,—Therefore, in the apportionment as between A. and B., the value of A. (in this competition with B.) will, *semble*, be taken after deducting the part of the mortgage debt which is to be borne exclusively by A.

(*f*) 2 Atk. 446.
(*g*) *Flint* v. *Howard*, 1893, 2 Ch. 54.
(*h*) *South* v. *Bloxam*, 2 Hem. & Mill. 457.
(*i*) *De Rochefort* v. *Dawes*, L. R. 12 Eq. 540.
(*k*) *Lipscomb* v. *Lipscomb*, L. R. 7 Eq. 501.

(2) Marshalling as between the beneficiaries entitled under the will,—the general principle of.

II. *Marshalling as between Beneficiaries.*—In this group of cases, it is usually by reason of the disturbing action of the creditors of the deceased, that the question of marshalling arises,—although occasionally it may arise from other causes: And, firstly, where it arises from the disturbing action of the creditors, the general principle of marshalling, as between the beneficiaries, may be arrived at in this way, viz.,—Taking the various properties specified on p. 212, *supra*, in the order of their respective liabilities to the payment of debts as stated on that page, and substituting in the same order the various persons to whom these various properties would go if there were no debts to pay,—and to whom they do in fact go, so far as they are not exhausted by the payment of the debts,—We obtain the following list of the persons entitled to participate in the property of the deceased, that is to say,—

(1) The next of kin or residuary legatees;
(2) The devisees upon trust;
(3) The heir-at-law;
(4) The charged devisees (specific and residuary);
(5) The pecuniary legatees;
(6) The devisees (specific and residuary) and the specific legatees;
(7) The voluntary appointees by deed or will; and
(8) The widow.

Now from that list of beneficiaries, the general rule of marshalling is derived in this way, namely,—If any beneficiary in the list is disappointed of his benefit under the will through the creditor (in effect) seizing upon the fund intended for such disappointed person, then such person may recoup or compensate himself for that disappointment (*to the extent thereof*), by going against the fund or funds intended for (and in that way similarly disappointing in his turn) any one or more of the beneficiaries prior to himself in the list; and such secondly disappointed person or persons may (in his or their turn) do the like against those prior to him or them,—So that, eventually, the next of kin or (as the case may be) the residuary legatees have to bear the disappointment without any means of redress,—they having, in fact, no title to anything, save what

remains after a due administration of the estate (*l*): But nobody may go against any one who is *posterior* to himself on the list; and persons who occupy the *same* rank in the list contribute *pro ratâ*, as between or amongst themselves.

The general principle,—application of.

And, Firstly, as regards the widow's paraphernalia,—Although that (with the exception of necessary wearing apparel) is liable for her deceased husband's debts, still the widow will be preferred (in respect thereof) to a general legatee,—and will be entitled therefore to marshal assets, in all cases in which a general legatee would be entitled to do so (*m*); and (on principle) a widow, as to her paraphernalia, is entitled to precedence also over specific legatees and devisees (*n*),—and, in fact, to rank next after creditors (*o*).

Widow's paraphernalia preferred to a general legacy.

Right of heir as to descended lands.

And again, if an heir-at-law has paid any debts which ought to have been paid, first, out of the general personal estate; and, secondly, out of lands subject to a trust or power for their payment,—He may have the assets marshalled in his favour, as against those two funds,—but not, of course, to the prejudice of pecuniary legatees; and still less to the disappointment of specific legatees (*p*).

Devisee of lands charged with debts.

So also, a devisee of lands charged with the payment of debts,—paying any debts whilst any of the previously liable property remains unexhausted,—may have the assets marshalled in his favour, and to stand in the place of the creditors,—so far as regards, first, the general personal estate; second, land subject to a trust or power for raising the debts; and third, lands descending to the heir (*q*),—and a residuary devisee stands for this purpose in the same position as a specific devisee (*r*).

Position of a residuary devisee.

Against whom pecuniary legatees may marshal.

Pecuniary legatees, if the personal estate out of which they are to be paid has been exhausted by the creditors,

(*l*) *Baines* v. *Chadwick*, 1903, 1 Ch. 250, on p. 258.
(*m*) *Tipping* v. *Tipping*, 1 P. W. 730.
(*n*) *Probert* v. *Clifford*, Amb. 6.
(*o*) See and consider *Masson* v. *De Fries*, 1909, 2 K. B. 831.
(*p*) *Hanby* v. *Roberts*, Amb. 128.
(*q*) *Harmood* v. *Oglander*, 8 Ves. 106.
(*r*) *Hensman* v. *Fryer*, L. R. 3 Ch. App. 420; *Farquharson* v. *Floyer*, 3 Ch. Div. 109.

are entitled to be paid out of lands which descend to the heir (*s*), and out of lands devised subject to the debts (*t*), —but not, of course, out of lands comprised in a residuary devise (*u*), or specific devise (*x*). And as regards specific legatees and devisees (including residuary devisees), these, if called on to pay any debts of their testator, may have the whole of his other property (real and personal) marshalled in their favour,—so as to throw the debts (as far as possible) on the other assets which are antecedently liable (*y*); and a specific devisee (including a residuary devisee) and a specific legatee contribute *pro ratâ*, to satisfy the debts of the testator which the property antecedently liable has failed to satisfy (*z*).

Specific legatees and devisees,—contribute rateably *inter se*.

If specific devisee or legatee take subject to a burden, he cannot compel the others of the same class to contribute.

If, however, the subject of any specific devise (including a residuary devise) or specific bequest is liable to any particular burden of its own, the devisee or legatee must alone bear it: And, in the case of a specific legacy, the title of the legatee thereto (once the executor has assented to the bequest) commences as from the date of the testator's death,—and the legatee bears *as from that date*, and in exoneration of the residuary personal estate, the outlay incident to the legacy for (say) upkeep (*a*): Also, in the case of a specific (or residuary) devise of land bought by the testator but not paid for, the devisee cannot call on the other devisees (or on the specific legatees) to pay a proportion of the unpaid purchase-money (*b*); and where a specific (or residuary) devise is charged with a particular legacy or portion, and it is necessary to resort to the land comprised in the devise for the payment of the debts, the devisee is liable, in total exoneration of the legatee or portionist.

(*s*) *Sproule* v. *Prior*, 8 Sim. 189.
(*t*) *Rickard* v. *Barrett*, 3 K. & J. 289.
(*u*) *Lancefield* v. *Iggulden*, L. R. 10 Ch. App. 136.
(*x*) *Knight* v. *Knight*, 1895, 1 Ch. 499; *Smith* v. *Smith*, 1899, 1 Ch. 365.
(*y*) *Broadwood* v. *Lyons*, 1911, 1 Ch. 277.
(*z*) *Tombs* v. *Roch*, 2 Coll. 490.
(*a*) *In re Pearce*, 1909, W. N. 94.
(*b*) *Emuss* v. *Smith*, 2 De G. & Sm. 722.

Marshalling between legatees, where certain legacies are charged on real estate and the others are not so charged.

Secondly, where the marshalling arises otherwise than from the disturbing action of the creditors,—as, *e.g.*, where some of the legacies are charged on the real estate, and the others not,—The marshalling as between the legatees arises simply from the presumption, that the testator wishes, that all the legacies shall (if possible) be paid: And in order to understand this, it must be borne in mind, that (*even to the present day*) legacies are not payable out of real estate directly,—*unless* the testator has charged his real estate with their payment,—there never having been any statute which does for legacies what the statute 3 & 4 Will. IV. c. 104, has done for simple contract debts. Therefore, if a testator leaves certain legacies payable only out of his personal estate, and certain others which (in aid of his personal estate) he charges on his real estate,—equity will (in case the personal estate is insufficient to pay all the legacies) marshal the legacies,—So as to throw those charged on the real estate entirely on that estate, in order to leave more of the personal estate for the other legacies (*c*).

Legacies, when deemed to be charged on real estate.

It is important therefore to inquire, what amounts to a charge of legacies on the real estate: And, Firstly, the intention to create such a charge is not readily presumed (*d*): But, Secondly, the charge may be either express or implied,—and an implied charge arises, if (after the gift of the legacies) the testator gives (*e.g.*) "all the *residue* of his real and personal estate" to specified persons,—or where the will directs, that any legacies which fail shall fall into the "*residue*" (*e*); and the word "*residue*" need not be used, if there are other words to the like effect (*f*). But, *nota bene*, under such a gift of residue, the real and personal estates comprised therein are not liable, as a *mixed fund* (proportionately and rateably), to the payment of the legacies,—the personal estate still being, in general, under the primary liability, and the real estate being only liable for the deficiency (if any) of the personal estate (*g*). And

(*c*) *Bonner* v. *Bonner*, 13 Ves. 379.
(*d*) *Hassel* v. *Hassel*, 2 Dick. 527.
(*e*) *Bray* v. *Stevens*, 12 Ch. Div. 162.
(*f*) *Bawden* v. *Cresswell*, 1894, 1 Ch. 693.
(*g*) *Greville* v. *Browne*, 7 H. L. Ca. 689; *Roberts* v. *Roberts*, 1902, 2 Ch. 834.

Where a legacy charged on real estate fails, it will not be treated as if it were not so charged, so as to be made transmissible.

further *nota bene*, that where the charge of a legacy upon real estate fails to affect it (in consequence of an event happening subsequently to the death of the testator),—as the death of the legatee before the time of payment,—The Court will not treat the legacy as not so charged, in order merely to make the legacy transmissible (*h*).

Assets would never be marshalled in favour of charities,—*Scil.*, because of the Mortmain Act, as explained on pp. 76, 77, *supra*,—excepting in the exceptional cases in these same pages referred to.

(*h*) *Prowse* v. *Abingdon*, 1 Atk. 482.

CHAPTER XVI.

MORTGAGES.

Legal mortgage,—also Equitable mortgage,—definition of.

In the case of land, a legal mortgage may be defined as a debt secured on the land, the legal ownership of the land becoming vested in the creditor, and the equitable ownership of the land remaining vested in the debtor; and an *equitable* mortgage may be defined as a debt secured upon an equitable estate or interest in the land, or secured by an equitable charge only on the land,—or by some other assurance whereby the legal estate does not pass,—or secured by a deposit simply of the title-deeds (or other the documents of title) relating to the land.

What properties are mortgageable;

There may, of course, also be mortgages of personal estate; and, in fact, all kinds of property are, as a rule, mortgageable,—hereditaments, whether corporeal or incorporeal; and personal estates, whether in possession or in action,—and whether the estate or interest in the property be the legal estate or the equitable estate, or be for life or for the absolute interest, and whether it be a vested, expectant, or contingent interest. But there are certain kinds of property which, for special reasons, are not mortgageable: For example, the profits of an ecclesiastical benefice are (by the 13 Eliz. c. 20) not capable of being charged,—either directly (*a*), or indirectly (*b*); and this prohibition extends to pew-rents (*c*), and to the pensions of retired incumbents (*d*).

and what are not?

However, under the provisions of particular statutes, ecclesiastical benefices may (*to a limited extent*) be charged,—*Scil.*, for rebuilding and repairing the rectory-

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(*a*) *M'Bean* v. *Deane*, 30 Ch. Div. 520.
(*b*) *Hawkins* v. *Gathercole*, 1 Jur. N. S. 481.
(*c*) *In re Leveson*, 8 Ch. Div. 96.
(*d*) *Gathercole* v. *Smith*, 17 Ch. D. 1; 34 & 35 Vict. c. 44.

house or vicarage (*e*); and loans made by the Governors of Queen Anne's Bounty (on the security of the endowments of the benefice) are valid,—*Scil.*, where made in accordance with the relevant Acts (*f*). The estates of a charity also are, in general, not mortgageable,—save with the previous consent of the Charity Commissioners (*g*), —or (in the case of schools) of the Board of Education (*h*).

Also, the assignment of certain classes of property being void on the ground of public policy, a mortgage of them would be equally void (*i*),—although they may (subject to leaving enough to satisfy the demands of public policy) be got at under the Bankruptcy Act, 1883 (*k*),—usually, at least: And, of course, any property which is given for an estate or interest expressed to be defeasible on any attempt to mortgage it, is not mortgageable; and the separate property of a married woman, which she is restrained from anticipating, is (of necessity) not mortgageable,—*Scil.*, unless the Court should (for the specific purpose of the mortgage) lift off the restraint, under s. 39 of the Conveyancing Act, 1881 (*l*). But, *nota bene*, restrained separate estate (*m*), or retired pay (*n*), once actually paid or received, is mortgageable.

Mortgages by companies,—of their properties.

As regards public companies,—The properties of the company may be mortgageable; and yet, if the company has no power to borrow, or only a limited power to do so, any mortgage,—or (as the case may be) any mortgage in excess of the limited power,—would be void as being *ultra vires*; and this rule is applicable, whether the company is a public company properly so called (*o*), or is a company merely incorporated,—*Scil.*, under the former Companies Acts (*p*), or now under the Companies Consolidation Act, 1908 (*q*). However, an ordinary trading com-

(*e*) 51 & 52 Vict. c. 20.
(*f*) *Lidbetter* v. *Hatch*, 1907, 1 Ch. 404.
(*g*) *Fell* v. *Official Trustee*, 1898, 2 Ch. 44.
(*h*) *Whittle's case*, 1907, 2 Ch. 486.
(*i*) *L'Estrange* v. *L'Estrange*, 13 Beav. 281.
(*k*) *In re Ward*, 1897, 1 Q. B. 266.
(*l*) *Re Milner's Settlement*, 1891, 3 Ch. D. 547.
(*m*) *Dresel* v. *Ellis*, 1905, 1 K. B. 574.
(*n*) *Jones & Co.* v. *Coventry*, 1909, 2 K. B. 1029.
(*o*) *Wenlock* v. *River Dee Co.*, 10 App. Ca. 354.
(*p*) *Ashbury Co.* v. *Riche*, L. R. 7 H. L. 653.
(*q*) 8 Edw. VII. c. 69.

pany (*r*),—and even a public company (*s*),—may borrow for any legitimate *incidental* purpose of the company,—and may, therefore, give (*e.g.*) a new mortgage by way of providing for a valid existing mortgage, where the existing mortgage is being enforced *adversely to the interests of the company* (*t*). But, *nota bene*, a limited company (unless it was a railway company) could not have borrowed on *irredeemable* debentures,—but may now do so (*u*).

"Undertaking,"—mortgage of.

Where a company has the power to borrow, and mortgages its "undertaking," the mortgage extends not to the thing itself, but to the produce or profits thereof (including the sale-proceeds of its surplus lands, if any (*x*)); and such mortgages confer, of course, priority over the general creditors (*y*). And as regards "*calls*," not only calls already made (*z*), but also "future calls,"—*Scil.*, up to the date of an order for the winding up of the company (*a*), but not after that date (*b*) or after the commencement of the winding up (*c*),—may be mortgaged; but calls which can only be made in the event of (and for the purposes of) the winding up, cannot be mortgaged at all (*d*).

Mortgage at common law,—nature of.

By the old common law, a mortgage was an estate upon condition,—the condition being that, on payment by the mortgagor (at a time and place certain) it should be lawful for him to re-enter; and immediately on the mortgage being made, the mortgagee became (subject to the condition) the legal owner of the land with a right to immediate possession (*e*): And if the condition was (in due course) performed, the mortgagor re-entered,—and usually, obtained a re-conveyance; but if the condition

(*r*) *General Auction Co.* v. *Smith*, 1891, 3 Ch. 432.
(*s*) *Stagg* v. *Medway Navigation*, 1903, 1 Ch. 169.
(*t*) *Bannatyne* v. *McIver*, 1906, 1 K. B. 103.
(*u*) 8 Edw. VII. c. 69, s. 103.
(*x*) *Gardner* v. *L. C. D. Rail. Co.*, L. R. 2 Ch. App. 201.
(*y*) *In re Liskeard, &c. R. C.*, 1903, 2 Ch. 681.
(*z*) *In re Sankey Brook Co.*, L. R. 10 Eq. 381.
(*a*) *In re Pyle Works*, 44 Ch. Div. 534.
(*b*) *In re Streatham Estates Co.*, 1897, 1 Ch. 15.
(*c*) *Johnson* v. *Spratts Patent*, 1898, 2 Ch. 149.
(*d*) *Bartlett* v. *Mayfair Property Co.*, 1898, 2 Ch. 28.
(*e*) *Doe* d. *Roylance* v. *Lightfoot*, 8 Mee. & W. 533.

was not performed, the mortgagee's estate became absolute, the legal right of redemption being then lost for ever.

Mortgagor's equity to redeem, notwithstanding forfeiture at law.

The harshness of the old common law in this respect was softened by Courts of Equity: Which Courts (leaving the legal effect of the transaction unaltered) declared it to be against conscience, that the mortgagee should retain as owner what was intended as a mere security,—And accordingly, these Courts adjudged, that the breach of the condition should be relieved against,—so that the mortgagor, although he had lost "his *legal* right to redeem," should nevertheless have "an *equity* to redeem," on payment (within a reasonable time) of the principal interest and costs: In other words, when the legal right to redeem was gone, there arose an equity to redeem (*f*).

Mortgages, an exception to the maxim, *modus et conventio vincunt legem.*

And equity adjudged, that the legal maxim, "*modus et conventio vincunt legem,*" was inapplicable to mortgages, —That is to say, the debtor could not,—even by the most solemn engagement, entered into *at the time of the loan,* although, by *subsequent* bargain, he might (*g*),—preclude himself from his equity to redeem; and it was established, as a principle not to be departed from, that "*once a mortgage always a mortgage,*"—In other words, that an estate could not at one time be a mortgage and at another time cease to be so *by one and the same deed:* And therefore, whatever clause or covenant there might be in the conveyance, yet if the intention of the parties was, that such conveyance should be a mortgage only, a Court of Equity would so construe it (*h*). Also, a conveyance, although absolute in terms, *if shown to have been intended as a security only,* would be redeemable as a security (*i*),—So much so that a true beneficial purchase by a solicitor from his client (if it was too beneficial for the purchaser) would be treated as a mortgage only, and redeemable accordingly (*k*).

"Once a mortgage always a mortgage."

"Clog" on redemption,—

Nor may the equity of redemption be "clogged" (*i.e.*,

(*f*) *Williams* v. *Morgan*, 1906, 1 Ch. 804.
(*g*) *Lisle* v. *Reeve*, 1902, A. C. 461.
(*h*) *Salt* v. *Northampton* (*Marquess*), 1892, A. C. 1.
(*i*) *Purcell* v. *Macnamara*, 14 Ves. 91.
(*k*) *Pearson* v. *Benson*, 28 Beav. 598.

unduly fettered) by any restrictive provisions (*l*): But the so-called "*clog*" is sometimes parcel of the obligation itself,—In which latter case it is perfectly good (*m*),—unless of an unconscionable character (*n*). And, generally agreements between a mortgagee and his mortgagor which do not "clog" the equity of redemption are good,—For example, a right of *pre-emption* given to the mortgagee, in case the mortgagor should proceed to a sale of the mortgaged property (*o*); or an agreement not to call in the principal moneys (for a specified number of years), so long as the interest is punctually paid (*p*); or an agreement (in the mortgage of a public-house) that the mortgagor shall take all the beer to be consumed in the house from the mortgagee (*q*).

what is, and what is not?

Mortgages must be distinguished, of course, from absolute *bonâ fide* sales, accompanied with a collateral agreement of re-purchase by the mortgagor within a stipulated time; and the collateral agreement may be either introduced into the agreement for sale at the time, or may be made at a subsequent period. And whether any particular transaction is a mortgage properly so called or is a sale with such right of re-purchase, depends on the special circumstances of each case,—parol evidence being admissible to show, that what (*on the face of the deed*) is an absolute conveyance, was intended to be by way of security only (*r*): And if (*e.g.*) the money paid would be grossly inadequate as the price for the *absolute* purchase of the estate,—or if the grantee was not let into immediate possession of the estate, or accounted for the rents to the grantor, and only retained an amount equivalent to his interest (*s*),—The conveyance would be deemed to be by way of security only. And *nota bene*,

Conveyance with option of re-purchase in mortgagor.

Circumstances distinguishing a mortgage from a sale with right of re-purchase.

(*l*) *Carritt* v. *Bradley*, 1903, A. C. 253; *B. S. A. Co.* v. *De Beers*, 1910, 1 Ch. 354; 1910, 2 Ch. 502.
(*m*) *Rice* v. *Noakes*, 1902, A. C. 24.
(*n*) *Santley* v. *Wilde*, 1899, 2 Ch. 474.
(*o*) *Orby* v. *Trigg*, 9 Mod. 2.
(*p*) *Kerne* v. *Biscoe*, 8 Ch. Div. 201.
(*q*) *Biggs* v. *Hoddinott*, 1898, 2 Ch. 307.
(*r*) *Douglas* v. *Culverwell*, 3 Giff. 251.
(*s*) *Williams* v. *Owen*, 5 My. & Cr. 303.

Effects of this distinction:

the difference between a mortgage and a sale with right of re-purchase is very important, *with reference to the consequences of each*:—For (in the case of a mortgage) the mortgagor, even after forfeiture at law, has his right of redemption in equity; but (in the case of a sale with right of re-purchase) the time limited for the exercise of the right must be exactly observed (*t*), and equity may not relieve (*u*).

Other forms of securities.

There were anciently these three other species of securities for money lent, namely:—

(1) *Vivum vadium,*—lender to pay himself from rents and profits.

(1) The *vivum vadium,*—in which the owner of an estate, in consideration of money lent, conveyed it to the lender,—with a condition that as soon as the lender repaid himself out of the rents and profits, the debtor might re-enter; and it was called a *vivum vadium,* because (as the security itself worked off the debt) it was deemed to be in a manner *living;*

(2) *Mortuum vadium,*—creditor took rents and profits without account.

(2) The *mortuum vadium,*—which was a feoffment to the creditor, to be held until the debtor paid him a given sum,—until which time, the creditor received the rents *without account,* and the security (not of itself working off the debt) was in a manner *dead;* and

(3) Welsh mortgage,—mortgagor may redeem at any time.

(3) The *Welsh mortgage,*—in which (as in the *mortuum vadium*) the rents and profits were received by the mortgagee without account, and the principal therefore remained undiminished. And, *nota bene,* in all these three species of ancient mortgages, the mortgagee could not either foreclose or sue for his money, and the mortgagor might have redeemed at any time (*x*), no Statute of Limitations being applicable (*y*).

The nature of an equity of redemption,—it is an estate in the land.

An equity of redemption was originally regarded as a mere *right,* but afterwards it was held to be an *estate* (*z*): And that is now the accepted opinion; and the person entitled to the equity (being the real owner of the land)

(*t*) *Barrell* v. *Sabine,* 1 Ves. 268.
(*u*) *Dibbins* v. *Dibbins,* 1896, 2 Ch. 348.
(*x*) *Howell* v. *Price,* Prec. Ch. 423, 477.
(*y*) *Fenwick* v. *Reed,* 1 Mer. 114.
(*z*) *Casborne* v. *Scarfe,* 1 Atk. 603.

may (subject only to the rights of the mortgagee) exercise all acts of ownership over the land,—and may settle or devise, or even again mortgage, the land. And as regards the descent of the mortgaged estate, if the land be of gavelkind tenure, the equity descends in gavelkind; and if the land be borough-English, the youngest son inherits (*a*); and in the case of copyholds, the equity descends according to the customary rules of descent; and in the case of freeholds, the equity descends, of course, according to the ordinary canons of descent,—modified (as these latter have been modified) by statute.

Who may redeem.

Also, all persons entitled to any estate or interest in the equity are entitled to come into a Court of Equity to redeem the land,—That is to say, (1) The heir, or (in the case of copyhold lands) the customary heir; (2) The devisee; (3) A tenant for life, a remainderman, a reversioner, a dowress, a jointress, a tenant by the curtesy, or other limited owner; (4) A subsequent purchaser or lessee (*b*); (5) a subsequent mortgagee (*c*); (6) A judgment creditor even (*d*); (7) The crown on a forfeiture; (8) The lord on an escheat; (9) A bankrupt (after annulment of his bankruptcy (*e*)); and (10) A volunteer even (*f*). But as regards tenants for life, when they redeem a mortgage on the inheritance, they do so (in general) for their own benefit; and therefore the mortgage is (in their case) kept alive,—equally as if it had been transferred (*g*). But remaindermen or reversioners cannot redeem against the wishes of the "prior life tenant" (*h*),—In other words, if the prior tenant for life shall have redeemed, he is not liable thereafter to be redeemed by the remainderman or reversioner (*i*).

Mortgage,—when redeemed by tenant for life, to be kept alive.

The price of redemption.

The redeeming party must pay to the mortgagee the principal of the mortgage debt,—and, usually, according

(*a*) *Fawcett* v. *Lowther*, 2 Ves. Sr. 301.
(*b*) *Tarn* v. *Turner*, 39 Ch. Div. 456.
(*c*) *Fell* v. *Brown*, 2 Bro. C. C. 278.
(*d*) *Bryant* v. *Bull*, 10 Ch. Div. 153.
(*e*) *In re Pearce*, 1909, 2 Ch. 492.
(*f*) *Rand* v. *Cartwright*, 1 Ch. Ca. 59.
(*g*) *Burrell* v. *Egremont*, 7 Beav. 205.
(*h*) *Ravald* v. *Russell*, You. 9.
(*i*) *Wilks* v. *Scriven*, 1 J. & H. 215.

to the statement of it in the mortgage deed (*k*),—together with, of course, the interest thereon, and the mortgagee's costs (*l*),—the aggregate amount to be so paid being called "*the price of redemption*." And an auctioneer-mortgagee may be entitled to add his commission to the "price of redemption"—that not being (*m*) (at least in the general case (*n*)) a secret profit. Also, the costs of an abortive sale will, in general, be added to the "price of redemption" (*o*),—but not the costs of the mortgage deed itself (*p*).

Successive redemptions,—order of, and general principle regarding.

Where there are successive mortgages, any subsequent mortgagee may redeem a prior mortgage, and every redeeming party is liable to be redeemed in his turn by those below him, and these latter are all liable to be redeemed by the mortgagor (*q*); and in the case of such successive mortgages, the rule or practice in an action of foreclosure is, to make them all parties to the action, and to offer to redeem all incumbrancers prior in date to the plaintiff, and to claim to foreclose all incumbrancers posterior in date to the plaintiff,—unless these latter, or some or one of them, shall redeem the plaintiff (*r*): Which rule is expressed in the phrase, "*Redeem up, foreclose down.*"

When the mortgagor is the redeeming party, his redemption of any prior mortgage will (in general) enure to give the next puisne mortgagee the priority of the redeemed mortgagee (*s*),—and care must therefore be taken to keep the prior mortgage alive, if that is the intention (*t*),—the Court always finding such an intention, in favour of the redeeming party, where he would be in any way prejudiced by the extinguishment of the

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(*k*) *Bickerton* v. *Walker*, 31 Ch. D. 151.
(*l*) *Cotterell* v. *Stratton*, L. R. 8 Ch. App. 295.
(*m*) *Glegg's case*, 22 Ch. Div. 549.
(*n*) *Field* v. *Hopkins*, 44 Ch. D. 524.
(*o*) *Sutton* v. *Rawlings*, 3 Exch. 407.
(*p*) *Wales* v. *Carr*, 1902, 1 Ch. 860.
(*q*) *Elton* v. *Curteis*, 19 Ch. Div. 49.
(*r*) *Beevor* v. *Luck*, L. R. 4 Eq. 537.
(*s*) *Toulmin* v. *Steere*, 3 Mer. 210.
(*t*) *Titley* v. *Thomas*, 2 Y. & C. C. C. 399, *n.*

debt (*u*). But where the first mortgage debt is (and it usually is) the *personal* debt of the mortgagor, and he redeems it, the Court will assume (in such a case), that the mortgagor intended the next mortgagee to benefit by that redemption (*v*),—So that the first mortgage will (in that case) be altogether gone, and the second mortgage will become the first mortgage,—*Scil.*, unless the redeeming mortgagor shall have signified an *express* intention to the contrary (*x*).

The law, as stated in the last preceding paragraph, may be also otherwise stated as follows, that is to say:—Firstly, if a first legal mortgagee buys the equity of redemption, and knows at the date of completing his purchase that there are subsequent mortgages on the property,—then his own first mortgage will be thereby discharged (*Toulmin* v. *Steere*),—unless he takes steps to keep it alive (*Titley* v. *Thomas*); but as the Court rather presumes that he will keep it alive (*Adams* v. *Angell*), therefore a very little will suffice in that case to keep the mortgage alive (*y*): And, Secondly, if the mortgagor himself pays off the first mortgage (being his own personal debt), he cannot keep the first mortgage alive as against the subsequent mortgagees (*Otter* v. *Vaux*); or, if he can do so at all, it is only by the most express and unambiguous declaration to that effect (*Hoare* v. *Tasker*), —That is to say, by having the first mortgage debt and the security therefor assigned to a trustee for himself, with a declaration accompanying the assignment, to the effect that the assignment is so made and taken to the intent to keep the mortgage alive.

Usually only one time now given for redemption.

In quite recent times, the practice (in a foreclosure action) has been, to give only one time for redemption to all the puisne mortgagees (including the mortgagor (*z*)), —and not (as formerly) successive times to each; and if the defendants all make default to pleading to the

(*u*) *Adams* v. *Angell*, 5 Ch. D. 634.
(*v*) *Otter* v. *Vaux*, 2 K. & J. 657.
(*x*) *Hoare* v. *Tasker*, 1905, 2 Ch. 587.
(*y*) *Butler* v. *Rice*, 1910, 2 Ch. 177; following *Chetwynd* v. *Allen*, 1899, 1 Ch. 353.
(*z*) *Smithett* v. *Hesketh*, 44 Ch. Div. 161.

statement of claim, one time only shall be given for redemption (*a*),—Unless the defendants (there being some question between them *inter se*) appear on the motion for judgment, and request successive periods for redemption,—In which latter case, the old rule of giving successive periods for redemption will be observed (*b*).

Arrears of interest recoverable.

The arrears of interest recoverable in an action of foreclosure are usually six years only, that action being within the 3 & 4 Will. IV. c. 27, s. 42,—whereby the arrears recoverable in an *action* against the mortgaged land are limited to six years. But, in an action for redemption (*c*),—or upon an application by the mortgagor (or by his legal personal representative) for payment out of Court (*d*),—the entire arrears are recoverable,—As they also are, when the mortgagee, having sold, holds the sale-proceeds, and the mortgagor sues to recover the surplus (*e*): The judgment in a foreclosure action usually directs, that the mortgagee shall add his costs of the action to his security, and interest (at the rate of 4 per cent. per annum) is computed as from the date of the taxing-master's certificate (*f*).

Interest on costs.

Right to compel a transfer, instead of being foreclosed.

When a mortgagee threatens foreclosure, the mortgagor (if not then minded to redeem) may require the mortgagee (not being or having been in possession (*g*)), to transfer the debt and to convey the estate to any nominee of the mortgagor, on receiving from such nominee "the price of redemption" as above defined (*h*). And where (in such a case) there are successive mortgages, this right to *compel* a transfer belongs to each puisne incumbrancer as well as to the mortgagor,—the incumbrancers having precedence of the mortgagor, and the incumbrancers having precedence according to their priorities (*i*). But, *nota bene*, in every case, *the transfer*

(*a*) *Platt* v. *Mendel*, 27 Ch. Div. 246.
(*b*) *Bartlett* v. *Rees*, L. R. 12 Eq. 395.
(*c*) *Dingle* v. *Coppen*, 1899, 1 Ch. 726.
(*d*) *Lloyd* v. *Lloyd*. 1903, 1 Ch. 385.
(*e*) *Marshfield* v. *Hutchings*, 34 Ch. Div. 721.
(*f*) *Eardley* v. *Knight*, 41 Ch. Div. 537.
(*g*) *Hall* v. *Heward*, 32 Ch. Div. 430.
(*h*) Conveyancing Act, 1881, s. 15.
(*i*) Conveyancing Act, 1882, s. 12.

of the debt and the conveyance of the estate are compellable, only upon the terms upon which a reconveyance would be compellable (*k*),—That is, *semble*, without any prejudice accruing thereby to the divers incumbrancers *inter se* (*l*): All which rules as to compelling a transfer apply also to liens and other equitable charges (*m*).

Time to redeem,—six months' notice, or else six months' interest, in general.

A person cannot, as of right, redeem before the time appointed in the mortgage deed,—So that if the loan is to continue for any specified number of years, it cannot be redeemed until the expiration of those years (*n*),—and the security must (in the meantime) be maintained, and the interest paid. Also, as regards these mortgages for a fixed term,—and mortgages repayable by fixed instalments,—or where (in addition to the ordinary proviso for redemption) there is a specific proviso, to the effect that (upon any specific default on the part of the mortgagor) the whole principal then remaining unpaid shall immediately become and be payable,—(1) The Statutes of Limitation begin to run (against the mortgagee) as from the date of the default happening (*o*); but (2) Where there is only the ordinary default, the foreclosure judgment preserves the provision as to the repayment of the debt by instalments (*p*).

If the mortgagee should (as a matter of indulgence) consent to accept payment before the legal period of redemption, he is entitled (in general) to the full amount of his interest up to that time (*q*); and if the mortgagor (after the legal right of redemption is gone) should wish to pay off the mortgage, he must give the mortgagee six calendar months' previous notice in writing of his intention to do so,—Which notice, once it is given, cannot be withdrawn, save with the mortgagee's consent (*r*): A mortgagor, who has given notice to pay off, must

(*k*) *Teevan* v. *Smith*, 20 Ch. Div. 724.
(*l*) *Pearce* v. *Morris*, L. R. 5 Ch. App. 22.
(*m*) *Bradford Bank* v. *Briggs*, 12 App. Ca. 29.
(*n*) *West Derby* v. *Metropolitan Life*, 1897, A. C. 647.
(*o*) *Reeves* v. *Butcher*, 1891, 2 Q. B. 509.
(*p*) *Greenough* v. *Littler*, 15 Ch. D. 93.
(*q*) *Broun* v. *Cole*, 14 Sim. 427.
(*r*) *Santley* v. *Wilde*, 1899, 1 Ch. 747.

punctually pay or tender the money at the expiration of the notice (*s*),—and otherwise he lets himself in for six months' further interest (*t*); But if the tender is in due time and is an effective tender (*u*), but not otherwise (*x*), it will stop the further running of the interest,—and (if the amount tendered is afterwards found sufficient) the mortgagee pays, in general, all the subsequent costs of the action (*y*).

If the mortgagee should himself commence an action to recover the mortgage debt (*z*), or should himself have given the notice to buy off the mortgage debt (*a*),—or should have entered into the possession (*b*); or if his mortgage should be merely an equitable mortgage by deposit of the title-deeds (with or without an accompanying memorandum (*c*)),—In any of these cases, the mortgagee is not entitled to six months' notice, or to interest in lieu thereof,—but only to interest up to (at the most) the date of the actual payment of his principal debt (*d*): But (in a foreclosure action) where the usual certificate has been made of the amount of interest which will have accrued due on the day therein appointed for redemption, the full interest up to the day so appointed must, of course, be paid (*e*).

Statutes of Limitation,—(1) Where the mortgagee is in possession,—bar of mortgagor.

As regards the Statutes of Limitations relative to mortgages,—Firstly, if the mortgagee has entered into possession,—The rule in equity always was, that after twenty years' possession the mortgagee should not "be disturbed,"—Excepting that, where the mortgagor was prevented from asserting his claim by reason of imprisonment, infancy, coverture, or other like legal disability,

(*s*) *Leeds Theatre* v. *Broadbent*, 1898, 1 Ch. 343.
(*t*) *Bartlett* v. *Franklin*, 36 L. J. Ch. 671.
(*u*) *Greenwood* v. *Sutcliffe*, 1892, 1 Ch. 1.
(*x*) *Kinnaird* v. *Trollope*, 42 Ch. D. 610.
(*y*) *Bourke* v. *Robinson*, 1911, 1 Ch. 480.
(*z*) *Prescott* v. *Phipps*, 23 Ch. Div. 372.
(*a*) *Edmondson* v. *Copland*, 1911, 2 Ch. 301.
(*b*) *Bovill* v. *Endle*, 1896, 1 Ch. 649.
(*c*) *Fitzgerald's Trustee* v. *Mellersh*, 1892, 1 Ch. 385.
(*d*) *West* v. *Diprose*, 1900, 1 Ch. 337.
(*e*) *Hill* v. *Rowlands*, 1897, 2 Ch. 361.

equity allowed ten years after the removal of the disability (*f*). Also, an acknowledgment given by the mortgagee, before the equity of redemption was wholly barred (*g*),—even after it appeared to be (but really was not) wholly barred (*h*),—would have sufficed to save the equity of redemption. And now, by the 3 & 4 Will. IV. c. 27, s. 28, and the 37 & 38 Vict. c. 57, s. 7, whenever a mortgagee obtains possession of the land comprised in his mortgage,—or of any *part* of such land (*i*),—the mortgagor may not bring a suit to redeem the mortgage,—*Scil.*, so far as regards the land (or part of the land) of which the mortgagee is so in possession,—but within twelve (formerly twenty) years next after the time when the mortgagee obtained possession,—or next after any *written* acknowledgment of the title of the mortgagor given to the mortgagor or his agent by the mortgagee (*k*); and no further time is now allowed for any disability (*l*).

And where the mortgage comprises, in addition to real estate, a policy (*e.g.*) of life-assurance,—and the mortgagee has been in possession of the land for twelve years, *and under such circumstances as to bar the mortgagor's recovery of the land*,—The mortgagor's right to recover the policy (*i.e.*, to redeem the policy) is also barred (*m*): But, of course, a policy which is in mortgage, will not cease to be redeemable, merely because the mortgagee has been permitted for a long time to pay the policy-premiums (*n*), —*Scil.*, unless other special circumstances combine with that (*o*).

(2) Where mortgagor in possession,—bar of mortgagee.

And, Secondly, if the mortgagee has not entered into possession,—By the 3 & 4 Will. IV. c. 27, as explained by the 7 Will. IV. & 1 Vict. c. 28, and as amended by the 37 &

(*f*) *Beckford* v. *Wade*, 17 Ves. 99.
(*g*) *Marwick* v. *Hardingham*, 15 Ch. Div. 339.
(*h*) *Stansfield* v. *Hobson*, 3 De G. M. & G. 620.
(*i*) *Kinsman* v. *Rouse*, 17 Ch. Div. 104.
(*k*) *Hickman* v. *Upsall*, 4 Ch. Div. 144; *Gatfield's case*, 1911, 1 Ch. 698.
(*l*) *Forster* v. *Patterson*, 17 Ch. Div. 132.
(*m*) *Charter* v. *Watson*, 1899, 1 Ch. 175.
(*n*) *Drysdale* v. *Piggott*, 8 De G. M. & G. 546.
(*o*) *Foster* v. *Roberts*, 29 Beav. 708.

38 Vict. c. 57, the mortgagee may sue to recover the possession, at any time within twelve years next after the last payment of any part of the principal money or interest, —although more than twelve years may then have elapsed since the mortgagee's right of entry accrued,—It being always (in such a case) understood, that, at the date of the execution of the mortgage, the mortgagor himself had not been already dispossessed (*p*). And, *nota bene*, where the mortgage is (as it usually is) of an estate in possession, the mortgagee's right of entry accrues on the execution of the mortgage-deed (*q*); but where the mortgage is of a remainder or reversion in land, the mortgagee's right of entry accrues only as from the time that the remainder or reversion falls into possession (*r*),—it being always remembered, that a fee simple estate, which is reversionary on a mere term of years, is a fee simple estate in possession (*s*),—usually, at least.

Where and so long as the mortgagor and the mortgagee are one and the same person (which occasionally happens), the time does not begin to run at all (*t*); and a husband (mortgagee) and his wife (mortgagor) may (for this purpose) be (in effect) one and the same person (*u*).

So long as the mortgagee may sue to recover the possession, so long may he also sue for a foreclosure (*x*); and, on obtaining his judgment for foreclosure, a new right of possession arises in the mortgagee, and is available for a further period of twelve years (*y*).

Once the mortgagee has actually entered into possession, his possession relates back to the date when he was first legally entitled to the possession,—for the purpose of (*e.g.*) suing in respect of any interim trespass (*z*).

(*p*) *Thornton* v. *France*, 1897, 2 Q. B. 143.
(*q*) *Doe* d. *Roylance* v. *Lightfoot*, 8 Mee. & W. 553.
(*r*) *Hugill* v. *Wilkinson*, 38 Ch. Div. 480.
(*s*) *Humble* v. *Humble*, 24 Beav. 535.
(*t*) *Topham* v. *Booth*, 35 Ch. Div. 607.
(*u*) *Heynes* v. *Dixon*, 1899, 2 Ch. 561.
(*x*) *Harlock* v. *Ashberry*, 19 Ch. D. 539.
(*y*) *Pugh* v. *Heath*, 7 App. Ca. 235.
(*z*) *Raffety* v. *King*, 1 Ke. 601.

Remedy on bond or covenant,—time for.

As regards the mortgagee's remedy by action of debt, —or of covenant on the covenant contained in his mortgage deed (*a*) (or on a bond collateral thereto (*b*)),—That remedy is now barred (*Scil.*, as against the mortgagor himself and his legal personal representatives and surety (*c*)) after twelve years, although the time for suing on a covenant or bond remains (in the general case) twenty years; and that is so, even where the mortgage is of a remainder not yet fallen into possession (*d*). But the twelve years reckon, of course, only as from the time when the right of action on the bond or covenant is complete; and occasionally the right of action is not complete, until after demand made for payment,—a demand being, in general, necessary, in all cases (including the case of a surety for the mortgagor (*e*)) where the liability to pay is *collateral* only (*f*); or until after the due performance of some other condition of payability (*g*). But what is above stated regarding the twelve years' limit of time for suing, is intended only as regards mortgages of *land*,—the 3 & 4 Will. IV. c. 27, s. 42, not being applicable to mortgages of (*e.g.*) reversionary personal estate (*h*).

Bar of time, effect of.

The statutes of limitation, in relation to *land*, bar and extinguish the title, and not merely the action or remedy of the dispossessed person (*i*),—although in relation to personal property, their effect is merely to bar the remedy without extinguishing the right. Therefore, where there was a second mortgagee, who never had possession, and he suffered his right of foreclosure to be barred, his second mortgage was held extinguished by the bar of time,—and the third mortgagee (who had paid off the first mortgage) was therefore not affected by the second mortgage at all (*k*).

What payments save the statute, and what not.

The right of foreclosure in the mortgagee is not kept

(*a*) *Sutton* v. *Sutton*, 22 Ch. Div. 511.
(*b*) *Fearnside* v. *Flint*, 22 Ch. Div. 579.
(*c*) *Lindsell* v. *Phillips*, 30 Ch. Div. 291.
(*d*) *Kirkland* v. *Peatfield*, 1903, 1 K. B. 756.
(*e*) *Allison* v. *Frisby*, 43 Ch. Div. 106.
(*f*) *Brown* v. *Brown*, 1893, 2 Ch. 300.
(*g*) *Atkinson* v. *Bradford Equitable*, 25 Q. B. D. 377.
(*h*) *Stuceley* v. *Kekewieh*, 1906, 1 Ch. 67.
(*i*) *Johnson* v. *Mounsey*, 11 Ch. Div. 284.
(*k*) *Kibble* v. *Fairthorne*, 1895, 1 Ch. 219.

alive by the payment to him of rent by the occupying tenant without the knowledge and subsequent adoption of the mortgagor (*l*),—nor by the payment to him of what purports to be the accruing interest on the mortgage debt, where such payment is made by any one other than the mortgagor himself or a person acting with the mortgagor's authority in that behalf (*m*),—Which authority may, however, be implied (*n*). But, of course, the payment of interest by the tenant for life keeps alive the mortgage debt, as against the remainderman (*o*),—*Scil.*, where they both claim under a settlement of the mortgaged hereditaments created by the mortgagor (by deed or by his will),—and, usually, as against the residuary estate also of the mortgagor (the settlor) who covenanted for its payment (*p*); and the payment of interest by a receiver appointed by the mortgagee (and who is the mortgagor's agent) will keep alive the mortgage debt(*q*).

Payment on account,—what is not?

Where a life-policy is included in the security, and the mortgagee receives the surrender value of the policy (*r*), that receipt is not,—usually, at least,—a part-payment by the mortgagor, so as to keep alive (or to revive) the residue of the mortgage debt; and a compulsory part-payment will not operate to keep alive the mortgage debt (*s*),—still less to revive the mortgage debt; and the receipt of the sale-proceeds arising from a part of the mortgaged property sold is not (for this purpose) a part-payment (*t*).

Principal, bar of,—when and when not a bar also of interest.

Where the covenant in the mortgage deed is (and it usually is) (1) for the payment of the principal and interest on a specified day; and also (2) for the payment of interest thereafter half-yearly,—If the remedy on the first covenant is barred by time, it does not follow, that the

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(*l*) *Harlock* v. *Ashberry*, 19 Ch. D. 539.
(*m*) *Newbould* v. *Smith*, 29 Ch. Div. 882.
(*n*) *Bradshaw* v. *Widdrington*, 1902, 2 Ch. 430.
(*o*) *Roddam* v. *Morley*, 1 De G. & J. 1.
(*p*) *Bassett* v. *Allen*, 1898, 2 Ch. 499.
(*q*) *Lilley* v. *Foad*, 1899, 2 Ch. 107.
(*r*) *Annaly* v. *Agar-Ellis*, 1900, 1 Ch. 774.
(*s*) *Morgan* v. *Rowlands*, L. R. 7 Q. B. 493.
(*t*) *In re McHenry*, 1894, 3 Ch. 290.

remedy on the second covenant (*i.e.*, on the *independent* covenant for payment of the interest) is also barred; but the contrary will, in general, be the case,—*Scil.*, until twelve years shall have elapsed since the remedy on the latter covenant also was complete (*u*). And here, it is convenient to observe, that where there is no covenant at all, to pay the interest after the day specified for the payment of principal and interest, the interest which is recoverable after that specified day is computed at the rate of (or at a rate never exceeding) 5 per cent. (*x*),—and is recoverable as damages only (*y*); and further, that when judgment has been obtained for payment of the mortgage debt, the rate of interest (*on the judgment*) is thereafter 4 per cent. only; but the old rate of interest (if higher than 4 per cent.) will nevertheless (in such a case, and for all the purposes of redemption) continue payable (*z*).

Of the estate of the mortgagor.

A mortgagor entitled for the time being to the possession or receipt of the rents or profits of any land, "*as to which no notice of his intention to take possession, or to enter into the receipt of the rents and profits thereof, shall have been given by the mortgagee,*" may now sue for such possession, or for the recovery of such rents and profits,—or to prevent (or recover damages in respect of) any trespass or other wrong relative thereto (*a*): Also, *semble*, he may even sue for breach by the lessee of his covenant to repair (*b*).

Mortgagor in possession, not accountable for rents and profits.

And generally, where the mortgagor remains in possession, he is entitled to enjoy the mortgaged premises in the ordinary way; and he may (*e.g.*) cut and sever the crops, or cut and sell the underwood (*c*),—and is not bound to account to the mortgagee for the rents and profits arising or accruing during his possession, even although the

(*u*) *Parr's Bank* v. *Yates*, 1898, 2 Q. B. 460.
(*x*) *Goodchap* v. *Roberts*, 14 Ch. D. 49.
(*y*) *Cook* v. *Fowler*, L. R. 7 H. L. 27.
(*z*) *Economic Life* v. *Osborne*, 1902, A. C. 147.
(*a*) Judicature Act, 1873, s. 25, sub-s. 5.
(*b*) Conveyancing Act, 1881, s. 10; *Turner* v. *Walsh*, 1909, 2 K. B. 484.
(*c*) *Trent* v. *Hunt*, 9 Exch. 14.

security should afterwards prove insufficient; but where the security is insufficient, a mortgagor in possession may be enjoined against felling timber (*d*), or cutting and removing the crops or the underwood (*e*).

Equity will not hinder the mortgagee from evicting the mortgagor after default, but will consider the mortgagor as being a mere tenant-at-will (*f*),—excepting that where (as usually happens) the mortgage deed contains a re-demise of the mortgaged premises (or contains an attornment clause (*g*)), the mortgagee must have regard to the terms of that re-demise or of that attornment clause. And here note, that (by means of such attornment clause) a true and effective tenancy between the mortgagor and the mortgagee is created (*h*); but that such tenancy is determined by a transfer of the mortgage (*i*),—*Scil.*, because the tenancy under the attornment clause is at will only (*k*).

Mortgagor could not make leases binding on mortgagee; *secus*, now.

The mortgagor could not formerly have made a lease binding on the mortgagee (*l*); and, therefore, both the mortgagor and the mortgagee used to concur in making the lease,—wherever (as in the case of mines) expense was to be incurred by the lessee. However, the mortgagee might (in such a case) have become bound by estoppel (*m*); and, now (under the Conveyancing Act, 1881, s. 18), as regards the hereditaments comprised in the mortgage (and these only (*n*)), or any part of them, the mortgagor (while in possession) may, and the mortgagee while in possession also may, make a valid lease (other than and except a mining lease),—provided the lease do not exceed twenty-one years for an agricultural or occupation lease, or ninety-nine years for a building (or repairing) lease, and provided the lease otherwise com-

(*d*) *Farrant* v. *Lovell*, 3 Atk. 723.
(*e*) *Bagnall* v. *Villar*, 12 Ch. D. 812.
(*f*) *Cholmondeley* v. *Clinton*, 2 Mer. 359.
(*g*) *Ex parte Williams*, 7 Ch. Div. 138.
(*h*) *Carpenter* v. *Collins*, Yelv. 73.
(*i*) *Brown* v. *Metropolitan Society*, 1 Ell. & Bl. 832.
(*k*) *Kemp* v. *Lester*, 1896, 2 Q. B. 162.
(*l*) *Keech* v. *Hall*, 1 Dong. 22.
(*m*) *Keith* v. *Gancia*, 1904, 1 Ch. 774.
(*n*) *King* v. *Bird*, 1909, 1 K. B. 837.

plies with the requisites of the Act (*o*). And, of course, a lease by the mortgagor, which is valid by force of the provisions of the Conveyancing Act, will continue valid after any foreclosure by the mortgagee (*p*),—Wherefore, also, any surrender of the lease must (in order to be valid) be made to the mortgagee (*q*).

Mortgagee entering into possession,—effect of.

Where the mortgagee (by virtue of his legal title as mortgagee) enters into possession,—which he does *by giving notice to the tenants to pay their rents* (*i.e.*, their growing rents and also their rents in arrear (*r*)) *to him, and by taking into his own hands generally the management of the estate* (*s*),—That is an assertion of his paramount title as mortgagee; and the mortgagor's tenants, although for terms of years (*being terms created subsequently to the mortgage and not under the provisions of the Conveyancing Act above referred to*) become thereupon tenants from year to year only to the mortgagee (*t*); and the lease itself being gone, the covenants contained in it are also gone (*u*): But the compensation (if any) to which the tenant would, in such a case, be entitled, as against his lessor, is now preserved to him as against the mortgagee also when he so takes possession (*x*).

Tenant-right valuation,—mortgagee now liable for.

Where there was the mortgage of a house; and subsequently the mortgagor (himself alone) made a lease of the house as a furnished house,—and then went bankrupt,—and the mortgagee gave notice to the occupying tenant to pay the rent to him, and the trustee in the bankruptcy did the same,—The Court said (in effect), that the rent must be apportioned (*y*).

Where the tenant in occupation (being a tenant of the mortgagor alone, and the lease not being good under the

(*o*) *Wilson* v. *Queen's Club*, 1891, 3 Ch. 522.
(*p*) *Brown* v. *Peto*, 1900, 1 Q. B. 346.
(*q*) *Robbins* v. *Whyte*, 1906, 1 K. B. 125.
(*r*) *In re Ind, Coope & Co.*, 1911, 2 Ch. 223.
(*s*) *Noyes* v. *Pollock*, 32 Ch. D. 53.
(*t*) *Corbett* v. *Plowden*, 25 Ch. Div. 678.
(*u*) *Towerson* v. *Jackson*, 1891, 2 Q. B. 484.
(*x*) 53 & 54 Vict. c. 57; 8 Edw. VII. c. 28, s. 12.
(*y*) *Salmon* v. *Matthews*, 8 Mee. & W. 827.

provisions of the Conveyancing Act, 1881) pays his rent to the mortgagee, pursuant to the notice of the mortgagee to do so,—That payment will,—usually (*z*), but not invariably (*a*),—create the relationship of tenant to the mortgagee, and will be a good answer to any subsequent demand of the mortgagor for the same rent (*b*). Also, generally, as between the mortgagor and the mortgagee, there is no apportionment of the accruing rents (*c*),—except (possibly) as regards rent paid *as rent* in advance (*d*). And a mortgagee being entitled to treat all the subsequent lessees of the mortgagor as trespassers,—so as to eject them without first giving them notice,—*Scil.*, where the leases are not good under the Conveyancing Act, 1881,—he will (in case he so eject them) be entitled to the mesne profits from the date of his taking the possession (*e*),—such mesne profits being in lieu of the rent which he would otherwise have been entitled to receive.

Mesne profits, —title of mortgagee to.

Entry into possession,— of part.

The mortgagee, it seems, may enter into possession of part of the mortgaged property, without also entering into possession of the rest of the property (*f*); but a mortgagee, when he has once taken possession, cannot at pleasure give up the possession again (*g*),—although he will sometimes (by means of a receiver being appointed (*h*)) be let out of the possession: Also, note, that a mortgagee ought not (without good reason) to dispossess his mortgagor (*i*),—nor is it (in general) for his advantage to do so (*k*).

Where a mortgagee has entered into possession,—and dies in possession, and his executors and trustees continue

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(*z*) *Underhay* v. *Read*, 20 Q. B. D. 209.
(*a*) *Evans* v. *Elliot*, 9 A. & E. 342.
(*b*) *Rogers* v. *Humphreys*, 4 A. & E. 299.
(*c*) *Anderson* v. *Butler's Wharf*, 48 L. J. Ch. 824.
(*d*) *De Nicholls* v. *Saunders*, L. R. 5 C. P. 589.
(*e*) *Turner* v. *Cameron Coal Co.*, 5 Exch. 932.
(*f*) *Simmins* v. *Shirley*, 6 Ch. Div. 173.
(*g*) *Prytereh* v. *Williams*, 42 Ch. Div. 590.
(*h*) *Gloucester Bank* v. *Rudry Co.*, 1895, 1 Ch. 629.
(*i*) *Moore* v. *Shelley*, 8 App. Ca. 285.
(*k*) *In re Pope*, 17 Q. B. D. 743, on p. 749.

his possession; and the mortgage debt is (by the will) settled on A. for life, with remainder over,—The net rents received by the executor-trustees are applicable as income (and are payable to A. as tenant for life), but to the extent only of the interest on the mortgage debt,—the surplus (if any) going to capital,—(*Scil.*, for the benefit of the remainder over (*l*)).

Receiver of mortgaged estates.

A mortgagee may bargain with the mortgagor for the appointment of a receiver, to be paid by the mortgagor; and such receiver is,—in general (*m*), but not invariably (*n*),—the agent of the mortgagor; and under the Conveyancing Act, 1881, ss. 19, 24, a power to appoint a receiver has been made incident to every mortgage of lands by deed, unless the deed expressly includes such power (*o*). And it is to be remembered, that the receiver so appointed receives all the rents in arrear and unpaid at the date of his appointment,—and receives also, of course, all the future-accruing rents (*p*); and if the mortgagor is himself the occupying tenant, he pays to the receiver an occupation rent (accruing from the date of the demand therefor (*q*)). But the power of a receiver extends, of course, only to the property comprised in the security,— Consequently, in the case of a mortgage of lands on which an hotel is built, the receiver is not (or not necessarily) of the hotel business, but of the rents and profits only of the mortgaged lands,—Wherefore a receiver will not, in general, be appointed manager also of the hotel business (*r*),—*Secus*, if the hotel (as such) is comprised in the security (*s*),—or if the goodwill of the hotel business is (under the word "property," or otherwise) comprised in the security (*t*). Also, in the case of a mortgage of coal mines, if the colliery business is comprised in the

Receiver and manager,— or receiver only—when?

(*l*) *In re Coaks, Coaks* v. *Bayley*, 1911, 1 Ch. 171.
(*m*) *Law* v. *Glenn*, L. R. 2 Ch. App. 634.
(*n*) *Robinson* v. *Chic, Ltd.*, 1905, 2 Ch. 123; *Deyes* v. *Wood*, 1911, 1 K. B. 806.
(*o*) *Mason* v. *Westoby*, 32 Ch. Div. 206.
(*p*) *Preston* v. *Tunbridge Wells*, 1903, 2 Ch. 323.
(*q*) *Yorkshire Banking Co.* v. *Mullan*, 35 Ch. Div. 125.
(*r*) *Whitley* v. *Challis*, 1892, 1 Ch. 64.
(*s*) *Makins* v. *Percy Ibotson*, 1891, 1 Ch. 133.
(*t*) *Leas Hotel case*, 1902, 1 Ch. 332.

security, a receiver and manager will be appointed (*u*),—at the suit of the mortgagee (*x*).

Receiver,—necessity for, and advantage of.

An equitable mortgagee could not, in general, have recovered the possession of the mortgaged premises by ejectment; and, therefore, it was a matter almost of course, for *him* to obtain the appointment of a receiver; and a legal mortgagee prefers, in general, to have a receiver appointed,—thereby avoiding the inconvenience of entering into possession (and becoming chargeable as a mortgagee in possession (*y*)).

Stipulation for lower rate of interest on punctual payment.

A stipulation that the mortgagee shall receive interest at £4 per cent. if regularly paid, but £5 per cent. if default is made, is good if £5 per cent. be reserved by the deed; and in the case of interest being so reserved, the higher and not the lower rate is taken upon redemption and foreclosure accounts (*z*),—and also where the mortgagee is in possession (*a*). But, *nota bene*, if £4 per cent. only is reserved, a stipulation that £5 per cent. shall be paid if the interest be not regularly paid, is void as a *penalty* (*b*). However, as regards the fines and so-called penal payments contained in mortgages to Building Societies, all these (if they are reasonable, within the Building Society Acts) are recoverable in full (*c*),—the premiums charged for these loans being in the nature of *principal* moneys advanced, and recoverable as such (*d*). And as regards all such mortgages, the rules for the time being of the society,—being rules reasonably made (*e*), —regulate (as between the society and the mortgagor) the provisions of the mortgage deed (*f*),—save upon a dissolution of the society (*g*). And a similar law is applicable, *semble*, to mutual life-policy societies (*h*).

Fines in Building Society mortgages.

(*u*) *Gloucester Bank* v. *Rudry Co.*, 1895, 1 Ch. 629.
(*x*) *Rowe* v. *Wood*, 1 J. & W. 315.
(*y*) *In re Pope*, 17 Q. B. D. 743.
(*z*) *Union Bank of London* v. *Ingram*, 16 Ch. Div. 53.
(*a*) *Bright* v. *Campbell*, 41 Ch. Div. 388.
(*b*) *Tipton Green Colliery* v. *Tipton Moat Colliery*, 7 Ch. Div. 192.
(*c*) *Protector Endowment Co.* v. *Grice*, 5 Q. B. D. 592.
(*d*) *Ex parte Bath, In re Phillips*, 27 Ch. Div. 509.
(*e*) *Hill's case*, 1899, 2 Ch. 60.
(*f*) *Strohmenger* v. *Finsbury Building Society*, 1897, 2 Ch. 469.
(*g*) *Kemp* v. *Wright*, 1895, 1 Ch. 121; Building Societies Act, 1894 (57 & 58 Vict. c. 47), ss. 1, 10; *Shove's case*, 1899, 2 Ch. 64, *n.*
(*h*) *British Equitable* v. *Baily*, 1906, A. C. 35.

Compound interest.

As regards compound interest on the mortgage debt, —If there be an accumulation clause in the mortgage deed,—which clause is not unusual in mortgages of reversions and remainders,—then the interest may be compounded, by the addition thereof (yearly or half-yearly) to the principal of the mortgage debt; and such an accumulation clause is perfectly valid (*i*),—excepting, possibly, in mortgages by a client to his solicitor (*k*); and excepting, possibly, as against the subsequent incumbrances (if any); and excepting where the mortgagee (being in possession) has always in hand a surplus of rents over interest (*l*).

Mortgagee must keep estate in necessary repair with surplus rents;

A mortgagee in possession is under a duty to keep the mortgaged premises in repair,—*to the extent of the surplus rents* (*m*); and he will be liable for any deterioration of the mortgaged premises which may be attributable to his neglect (*n*). In case he expends (upon the repair of the mortgaged premises) any moneys of his own (*i.e.*, moneys beyond the surplus rents), and that expenditure has been judicious, and has also resulted in permanent benefit to the mortgagor (*i.e.*, to the mortgaged premises),—but not otherwise (*o*),—he *may* be allowed such excess of expenditure; and for that purpose, a special inquiry will be directed. But a mortgagee in possession must not (under the pretext of improving the mortgaged premises) "*improve the mortgagor out of his equity of redemption altogether*,"—*Scil.*, by any huge increase in the "price of redemption" (*p*). Also, a mortgagee who (by means of a receiver and manager) has expended on the mortgaged premises more than the surplus rents, will not, in the general case, be allowed the excess of his expenditure,—*Scil.*, because he is not in possession, the receiver's possession not being the mortgagee's possession (*q*). But the moneys paid for the renewal of a lease,

but must not "*improve*" the mortgagor altogether out.

(*i*) *Clarkson* v. *Henderson*, 14 Ch. D. 348; *Salt* v. *Northampton*, 1892, A. C. 1.
(*k*) *Eyre* v. *Hughes*, 2 Ch. D. 148.
(*l*) *Wrigley* v. *Gill*, 1905, 1 Ch. 241; 1906, 1 Ch. 165.
(*m*) *Godfrey* v. *Watson*, 3 Atk. 518.
(*n*) *Sandon* v. *Hooper*, 6 Beav. 246.
(*o*) *Bompas* v. *King*, 33 Ch. D. 279.
(*p*) *Shepherd* v. *Jones*, 21 Ch. D. 469.
(*q*) *White* v. *Metcalf*, 1903, 2 Ch. 567.

where the mortgage is of a renewable lease, will always, *semble*, be allowed.

Mortgagee in possession must account, —even though he has assigned the mortgage, —unless such assignment is either: (a) With the consent of the mortgagor; or (b) By direction of the Court.

A mortgagee in possession, who (*without the assent of the mortgagor*) assigns over the mortgage to another, is liable to account for the rents and profits received *subsequently* to the assignment,—on the principle that, having turned the mortgagor out of possession, it is incumbent on him, to take care in whose hands he places the estate (*r*). But this rule of equity applies, only when the assignment is the mortgagee's own voluntary act,—and is not applicable, when the assignment is by direction of the Court in a redemption suit. Also, every assignee of a mortgage debt, who takes his assignment without the privity of the mortgagor, takes *subject to the state of the accounts* between the mortgagor and the original mortgagee as existing at the date of the assignment (*s*),—and if the mortgage is an equitable mortgage, he takes, in fact, *subject to all the equities* (*t*).

Back-rents,— accountability for: (1) By first mortgagee in possession,— after notice by second mortgagee.

When there are successive mortgages, and the first mortgagee is in possession, he is accountable to the second mortgagee *of whose mortgage he has had notice*,—and will not be allowed any sums (on account of rents received) which *after such notice* he may have paid over to the mortgagor (*u*): But until such notice is given, he is not accountable to the second mortgagee for any surplus rents paid over to the mortgagor (*x*). Also, if a receiver has been appointed on behalf of the first mortgagee, the subsequent incumbrancers may apply to the receiver, and obtain payment of their interest out of any surplus rents in his hands; but if they make no such application, they are taken to rely (for both their principal and their interest) on their security against the land (*y*).

(2) By second mortgagee in possession,—

Where the second mortgagee is in possession, he is accountable like any other mortgagee in possession; but,

(*r*) *National Bank* v. *United Hand in Hand*, 4 App. Ca. 391.
(*s*) *Birkerton* v. *Walker*, 31 Ch. Div. 151; *Bateman* v. *Hunt*, 1904, 2 K. B. 530.
(*t*) *Vorley* v. *Cooke*, 1 Giff. 230.
(*u*) *Macleod* v *Jones*, 24 Ch. D. 289.
(*x*) *Law* v. *Glenn*, L. R. 2 Ch. App. 634.
(*y*) *Bertie* v. *Lord Abingdon*, 3 Mer. 560.

as a general rule, he is not accountable to the first mortgagee for the back-rents received (*z*),—unless, of course, the first mortgagee has given notice to the tenants to pay their rents to him. Also, if the receiver has been appointed on behalf of the second mortgagee, that appointment is always made subject to the rights of the prior incumbrancer who shall be in (or who shall enter into) possession of the mortgaged hereditaments,—so that the occupying tenant, paying either his back-rents or his accruing rents to the first mortgagee after notice from the latter so to do, is not liable to pay the same rents over again to the second mortgagee (or to the receiver of the latter (*a*)).

after notice by first mortgagee.

A mortgagee in possession, although liable to account, is not obliged to account according to the actual value of the land,—Unless it is proved, that he might have received the full value; or unless, in the exercise of his power of sale, he makes a gross mistake (whereby the value of the security is diminished (*b*)): Therefore, when the mortgagee enters, he is (in general) accountable only for what he actually receives, or would (but for his wilful default) have received (*c*),—and is not bound to (*e.g.*) work (or keep working), *at a speculative profit*, the mines in the land mortgaged (*d*). But if he pulls down old buildings *unnecessarily*, and erects new buildings in the place of them, he will be liable for the interim loss of rents (*e*).

Mortgagee is accountable for what he actually receives, or what (but for his *wilful default*) he might have received,—

For advantages of a purely collateral character derived by the mortgagee out of his possession of the mortgaged property,—*and which do not affect the mortgagor*,—the mortgagee is not accountable (*f*): For example, a man who is in occupation as a tenant, and who derives some special profit from his occupation, is not accountable for that,—merely because he happens to be also a mortgagee

except as regards *collateral* advantages.

(*z*) *Law* v. *Glenn*, *supra*.
(*a*) *Preston* v. *Tunbridge Wells*, 1903, 2 Ch. 323.
(*b*) *Tomlin* v. *Luce*, 41 Ch. Div. 573.
(*c*) *Mayer* v. *Murray*, 8 Ch. D. 424.
(*d*) *Rowe* v. *Wood*, 1 J. & W. 315; *Millett* v. *Davey*, 31 Beav. 470.
(*e*) *Sandon* v. *Hooper*, 6 Beav. 246.
(*f*) *White* v. *City of London Brewery Co.*, 42 Ch. Div. 237.

of the premises (*g*); and if one of two co-owners of a patent is also a mortgagee of his co-owner's share, he will not be liable to account at all for the profits which he makes by working the patent (*h*),—excepting, possibly, in respect of any *royalties* received under licences to work the patent (*i*).

Annual rests, —when and when not directed.

In taking the mortgage account, the aggregate rents are, in general, written off against the aggregate interest (*k*). But if, at the time of the mortgagee taking possession, the interest on his principal money is *not in arrear*,—or if the mortgagee remains in possession *after he has been fully paid* his mortgage debt (*l*),—the account will (in either of these two cases) be taken, in general, with "annual rests,"—That is to say, if the rents in any year exceed the amount of that year's interest, the excess will (in every year) be applied in reduction of the principal moneys due (*m*): But otherwise annual rests will not be directed. And, *nota bene*, annual rests will either be taken throughout the whole account, or not at all,—That is to say, there will be no break in the account, or in the principle of the account (*n*).

Mortgagee until payment could not be compelled to produce mortgagor's title-deeds; *secus*, now.

A mortgagee could not, formerly, have been compelled by the mortgagor to produce his (the mortgagor's) title-deeds, until payment of principal interest and costs,—even though the production was required for the purpose of enabling the mortgagor to negotiate a loan to pay off the mortgagee (*o*). But the law in this respect is now altered, as regards all mortgages made subsequently to the 31st December 1881 (*p*),—That is to say, the mortgagee is now compellable to produce the mortgagor's title-deeds before payment of the debt: But that does not mean, *semble*, that he is compellable to produce also *the mortgage deed*

(*g*) *Page* v. *Linwood*, 4 Cl. & F. 399.
(*h*) *Edwards* v. *Picard*, 1909, 2 K. B. 903.
(*i*) 7 Edw. VII. c. 28, s. 1; and 7 Edw. VII. c. 29, s. 37.
(*k*) *Union Bank* v. *Ingram*, 16 Ch. D. 53.
(*l*) *Ashworth* v. *Lord*, 36 Ch. Div. 545.
(*m*) *Patch* v. *Wild*, 30 Beav. 99.
(*n*) *Wrigley* v. *Gill*, 1906, 1 Ch. 165.
(*o*) *Sheffield* v. *Eden*, 10 Ch. Div. 291.
(*p*) 44 & 45 Vict. c. 41, s. 16.

itself before payment (*q*),—*Scil.*, Because the mortgage deed is the mortgagee's own deed, and never was one of the mortgagor's title-deeds,—unless where (the right of redemption being disputed) the mortgage deed also itself becomes a title-deed of his (*r*). But, of course, upon redemption, the mortgagee must hand over the mortgage deed (along with all the title-deeds),—and will be liable in damages for any title-deed that is then missing (*s*): Which damages may be considerable (*t*),—even where the loss is merely innocent on the mortgagee's part (*u*). Also, where there is a mortgage, and the mortgagee assigns the mortgage debt and the principal security therefor, he must assign also all (if any) collateral securities he may hold for the same debt,—*Scil.*, because the transferee must (as regards the mortgagor) occupy the same position (neither better nor worse) that the transferor occupied (*x*).

Mortgagee's liability for loss of deeds.

The mortgagee cannot purchase for himself under the power of sale contained in his mortgage deed (*y*); but a second mortgagee may lawfully purchase from a first mortgagee (*z*). Also, an execution creditor may lawfully purchase on the sale by the sheriff (*a*). Where the property in mortgage consists of (or comprises) a renewable leasehold, and the mortgagee renews,—he will take the renewal subject to the old equity of redemption (*b*), being allowed only his costs of the renewal (*c*). Also, if an advowson be in mortgage, and the living become vacant, the mortgagor (and not the mortgagee) presents (*d*),—That is to say, the mortgagor nominates to the mortgagee the person to be appointed to the living, and requests the mortgagee to present such nominee to the bishop for institution and induction; and the mort-

Mortgagee cannot take a valid lease from mortgagor.

Second mortgagee may purchase from first mortgagee.

Renewed leasehold.

Advowson.

(*q*) *Sheffield* v. *Eden*, *supra*.
(*r*) *Patch* v. *Ward*, L. R. 1 Eq. 436.
(*s*) *James* v. *Rumsey*, 11 Ch. Div. 398.
(*t*) *Brown* v. *Sewell*, 11 Ha. 49.
(*u*) *Shelmardine* v. *Harrop*, 6 Madd. 39.
(*x*) *Parker* v. *Clarke*, 30 Beav. 54.
(*y*) *Astwood* v. *Cobbold*, 1894, A. C. 150.
(*z*) *Shaw* v. *Bunney*, 33 Beav. 494.
(*a*) *Stratford* v. *Twynam*, Jac. 418.
(*b*) *Holt* v. *Holt*, 1 Ch. Ca. 190.
(*c*) *Godfrey* v. *Watson*, 3 Atk. 518.
(*d*) *Mackenzie* v. *Robinson*, 3 Atk. 559.

gagor may not agree to the contrary (*e*). The mortgagee of an advowson may, of course, realise his security by sale,—and may also (unless debarred by his own laches (*f*)) foreclose.

Mortgagee could not fell timber,—unless security was insufficient;

but may now do so, in a proper manner.

If a mortgagee in possession should have felled timber, an account would be decreed of the proceeds; and the amount (appearing due on the account) would be applied, in payment of the interest, and then in reduction of the principal; and the mortgagee may be restrained from continuing to fell the timber,—excepting that, if his security is insufficient, the Court will not restrain him (*g*). And the like rules applied (and still apply) to the opening of new mines (*h*): But as regards *trees*, the mortgagee in possession may now cut and sell timber (and other trees) ripe for cutting *and not planted or left standing for shelter or ornament*,—and may even employ a contractor for the purpose (the cutting by such contractor to be completed within twelve months from the date of the contract (*i*)).

Notice, effect of,—generally; and also in connection with the *tacking* and the *consolidation* of mortgages.

Where there have been successive mortgages to different individuals,—and the mortgages are either of the same property (in the case of each) or are of different properties,—two very intricate matters now fall to be considered, namely the doctrine of Tacking and the doctrine of Consolidation; but, for the better understanding of each of these two doctrines, it is necessary to first consider the doctrine of Notice.

Purchaser with notice of prior claim, a trustee to the extent of such claim.

I. *The Doctrine of Notice.*—No rule of equity is better established than this, that the person who purchases an estate, although for valuable consideration, *after notice* of a prior equitable estate or right, will not be able (by means of the legal estate or otherwise) to defeat the prior equitable estate or right,—but will, on the contrary, be deemed a trustee of the legal estate to the extent of (and

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(*e*) *Welch* v. *Peterborough* (*Bp.*), 15 Q. B. D. 432.
(*f*) *Brooks* v. *Muckleston*, 1909, 2 Ch. 519.
(*g*) *Withringlon* v. *Bankes*, Sel. Ch. Ca. 30.
(*h*) *Millett* v. *Davey*, 31 Beav. 470.
(*i*) Conveyancing Act, 1881, s. 19.

for the purpose of supporting) that prior estate or right: And if, therefore, a vendor should contract with two different persons *successively* (for the sale to each of them of the same estate), and the party with whom the second contract is made has *notice of the first contract*, and notwithstanding completes his contract by taking a conveyance of the legal estate,—The Court will (in a suit for specific performance by the first purchaser against the vendor and the second purchaser) decree the defendants to convey the estate to the first purchaser (*k*),—and the Court will, usually, make the like decree, although the notice of the prior title should be constructive only (*l*). But, *nota bene*, it is to be assumed in all these cases, that the first contract is a specifically enforceable contract (*m*),—because, if it is not, the second purchaser need not regard it,—and the right to upset it even may be conveyed to the second purchaser (*n*).

Lands in Middlesex,—effect of notice of unregistered deed.

In *Le Neve* v. *Le Neve* (*o*), where lands in Middlesex had been settled on a first marriage (by a deed which was not registered), and were again settled upon a second marriage *with notice* of the former settlement (by a deed which was registered), the former settlement was preferred to the latter settlement,—*Scil.*, because registration is not notice (*p*), and the settlor (who was the same person in the case of both settlements) was the person solely to blame for the non-registration of the first settlement. But, usually, the registered assurance will prevail (*q*),—unless it is a mere forgery (*r*): That is to say, it requires a very strong case to get over the effect of the Registry Acts,—express notice amounting to *fraud* being required (*s*), and mere negligence (*t*) or constructive notice (*u*) not sufficing: But it sometimes happens, that (as a matter merely of *construction*) the subsequent

(*k*) *Potter* v. *Sanders*, 6 Hare, 1.
(*l*) *Trinidad Asphalte Co.* v. *Coryat*, 1896, A. C. 587.
(*m*) *Goodwin* v. *Fielding*, 4 De G. M. & G. 90.
(*n*) *De Hoghton* v. *Money*, L. R. 2 Ch. App. 164.
(*o*) Amb. 436.
(*p*) *Cator* v. *Cooley*, 1 Cox, 82.
(*q*) *Elsey* v. *Lutyens*, 8 Ha. 159; *Jolland* v. *Stainbridge*, 3 Ves. 478.
(*r*) *Cooper* v. *Vesey*, 20 Ch. D. 611; *Gibbs* v. *Messer*, 1891, A. C. 248.
(*s*) *Rolland* v. *Hart*, L. R. 6 Ch. App. 678.
(*t*) *Agra Bank* v. *Barry*, L. R. 7 H. L. 135.
(*u*) *Bradley* v. *Riches*, 9 Ch. Div. 212.

document is subject to the prior document,—In which case, the subsequent document will not (merely by force of its prior registration) prevail over the prior document which is subsequently registered (*x*).

Lands in Yorkshire, effect of notice of unregistered deed.

And as regards lands in Yorkshire, registered assurances have priority (*inter se*) according to the dates of their registrations; and the priorities given by the Act are not affected by notice,—*except in the case of actual fraud* (*y*), —So that, in Yorkshire, registered assurances of lands are now in all cases on the same footing (in effect) as registered judgments. But, *nota bene*, where a document (*e.g.*, an adjudication order in bankruptcy) is not registrable, then (in Middlesex and in Yorkshire equally) its priority will not be defeated, by the mere registration of a subsequent registrable incumbrance (*z*). Also, where a registered security has been obtained under circumstances "*of grave moral blame*" attaching to the lender,—and it is registered purposely with the view of prejudicing the prior unregistered security,—That is "*actual fraud*" within the meaning of the Yorkshire Registry Acts (*a*). Also, an unregistered equity, of which the subsequent registered purchaser has notice, will still prevail against him,—*Scil.*, because it would be a fraud on his part not to hold his registered title subject thereto (*b*). Also, the general rule as regards *real* estate, is, that a subsequent equitable incumbrancer, who has taken his mortgage (or sub-mortgage) without notice of a prior mortgage, will not acquire priority over the prior mortgage, merely by giving notice of his mortgage (*c*) (or of his sub-mortgage (*d*)) to the trustee in whom the legal estate may remain vested; and as regards *personal* estate also, a second incumbrancer on a fund in Court, who (at the time of taking his security) has notice of a first incum-

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(*x*) *Jones* v. *Barker*, 1909, 1 Ch. 322.
(*y*) 47 & 48 Vict. c. 54; 48 Vict. c. 4; and 48 & 49 Vict. c. 26.
(*z*) *Re Calcott and Elvin*, 1898, 2 Ch. 460.
(*a*) *Battison* v. *Hobson*, 1896, 2 Ch. 403.
(*b*) *Crowly* v. *Bergtheil*, 1899, A. C. 374.
(*c*) *Humber* v. *Richards*, 45 Ch. D. 589.
(*d*) *Hopkins* v. *Hemsworth*, 1898, 2 Ch. 347.

brance thereon, will not acquire priority over the first incumbrancer, merely by giving notice to the debtor (*e*), or obtaining a stop-order on the fund (*f*) before the first incumbrancer has done so. Also, generally, as regards mortgages of a *chose in action*, you do not gain priority by giving prior notice of your mortgage, over any prior mortgage of which you have notice yourself (actual or constructive) at the time you lend your own money on your mortgage (*g*).

Case of sub-purchaser with notice, where his vendor bought without notice.

It has, however, been long settled, that if a person purchases land for valuable consideration with notice, but *from a person who bought the land without notice* (*h*), the second purchaser may (provided he obtain the legal estate in the land, or have the best right to call for it) shelter himself under the first purchaser,—Because, otherwise the first purchaser (although *bonâ fide*) would be unable to deal with the land, and the sale of real estates would be clogged.

And similarly, where a lessee had created a restrictive covenant binding on the demised premises, and afterwards surrendered the lease to his lessor who had no notice of the covenant,—so that the surrender was fully effective, —and the lessor then executed a new lease to the son of the lessee (the son being fully cognisant of the creation of the restrictive covenant by his father),—the Court said, the son was not bound by it (*i*).

Case of sub-purchaser without notice, where his vendor bought with notice.

And conversely, if a person who buys with notice sells to a *bonâ fide* purchaser for valuable consideration without notice, the latter may protect his title,—Therefore, in *Harrison* v. *Forth* (*k*), where A. purchased an estate with notice of the plaintiff's incumbrance (which was equitable),—and then sold the estate to B. who had no notice; and B. afterwards sold the estate to C., who had

(*e*) *In re Ind Coope & Co.*, 1911, 2 Ch. 223.
(*f*) *Re A. D. Holmes*, 29 Ch. D. 786.
(*g*) *Spencer* v. *Clarke*, 9 Ch. D. 137; *In re Weniger's Policy*, 1910, 2 Ch. 291.
(*h*) *In re Handman and Wilcox*, 1902, 1 Ch. 599.
(*i*) *Wilkes* v. *Spooner*, 1911, 2 K. B. 473.
(*k*) Prec. Ch. 51.

notice,—The Court held, that, though A. and C. had notice, yet (as B. had no notice) the plaintiff could not be relieved against the defendant C. But, *nota bene*, if B. had re-sold to A., the title of A. would have become again affected with the notice which A. had (*l*).

A purchaser of real estate, who had notice of a *voluntary* settlement, was formerly not affected by it (*m*),—the words of the statute 27 Eliz. c. 4 (against fraudulent conveyances), having so provided; but, by reason of the Voluntary Conveyances Act, 1893, he would now be affected by notice of such a settlement. Also, where a subsequent purchaser has actual notice of an equitable charge, and he subsequently completes his purchase on the faith of a *forged* discharge of (or *forged* receipt for) the equitable charge,—which forgery is, of course, a nullity (*n*),—he will hold subject to the charge,—and that even in the case of registered land (*o*). But notice of a contract, which is merely personal and collateral, will not affect a purchaser of the lands (*p*),—but a hire-purchase agreement (of machinery to be affixed to the land) is something more than merely personal and collateral (*q*).

Actual notice.

The effect of notice is, in general, the same, whether the notice be actual or constructive (*r*):—

And, Firstly, as regards *Actual* Notice,—In order to make it binding, it must be given by a person interested in the property,—and in the course of the business (*s*). Therefore, vague reports from persons not interested in the property (or notice given to a person in his private and not in his business capacity (*t*)), will not amount to actual notice; and a mere assertion of title in some other person (or a mere general claim of title by some other person) does not amount to actual notice of such other title: But if the know-

(*l*) *Barrow's case*, 14 Ch. D. 432.
(*m*) *Buckle* v. *Mitchell*, 18 Ves. 100.
(*n*) *Jared* v. *Clements*, 1902, 2 Ch. 399.
(*o*) *Gibbs* v. *Messer*, 1891, A. C. 248.
(*p*) *Phillips* v. *Miller*, L. R. 10 C. P. 420.
(*q*) *In re Samuel Allen*, 1907, 1 Ch. 575.
(*r*) *Prosser* v. *Rice*, 28 Beav. 68.
(*s*) *Barnhart* v. *Greenshields*, 9 Moo. P. C. 18.
(*t*) *Agra Bank* v. *Barry*, L. R. 7 H. L. 135.

ledge (from whatsoever source derived) is of a kind to operate upon the mind of any man of business, then it will amount to actual notice (*u*),—or, at all events, it *may* do so, but not necessarily: And in one case, where it was endeavoured to make a solicitor (C.) liable as a constructive trustee for the sale-proceeds of land coming to his hands, and which he had paid over to the persons rightfully entitled thereto (as he honestly believed),—notwithstanding that an alleged settlement was brought to and pressed upon his notice, and a copy or draft of it even was produced (the settlement itself, if it had ever been executed, being missing); and the solicitor (C.) persisted (and had good cause for persisting), that the settlement never had been executed,—The Court said, that C. could not, in such a case, be made liable,—although the settlement (as afterwards appeared) had been executed, in fact (*x*).

Constructive notice,—varieties of,—

Secondly, as regards *Constructive* Notice,—That is no more than *evidence* of notice, the weight of the evidence being such that the Court *imputes* to the purchaser that he had notice,—Whence also constructive notice has been sometimes called "*imputed*" notice (*y*): And in *Jones* v. *Smith* (*z*), Wigram, V.-C., resolved cases of constructive notice into two classes:—

(1) Where actual notice of a fact, which would have led to notice of other facts.

Firstly, "Cases in which the party charged has had actual notice, that the property in dispute was in fact incumbered in some way,—and the Court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led, by an inquiry into the incumbrance of which he had actual notice."

(2) Where inquiry purposely avoided to escape notice.

And, Secondly, "Cases in which the Court has been satisfied (from the evidence before it) that the party charged has designedly abstained from inquiring, for the very purpose of avoiding notice,—a purpose which, if proved, would clearly show, that he had a suspicion of the truth, and a wilful determination not to learn it." There-

(*u*) *Plumb* v. *Fluitt*, 2 Anst. 438.
(*x*) *Williams* v. *Williams*, 17 Ch. D. 437.
(*y*) *The Birnam Wood*, 1907, P. 1.
(*z*) 1 Hare, 55, applied in *Davis* v. *Hutchings*, 1907, 1 Ch. 356.

Examples of constructive notice.

fore, in *Bisco* v. *Earl of Banbury* (*a*), where the purchaser had actual notice of a specific mortgage, and the deed creating that mortgage referred also to other incumbrances,—The Court held, that the purchaser (knowing of the specific mortgage) ought to have inspected that mortgage,—and so would have discovered the others. [But, *nota bene*, the duty to inspect a specific document may (under special circumstances) not arise,—In which latter case, the purchaser would not be taken to know all the contents of the document (*b*): Also, in mercantile transactions, the doctrine of constructive notice, of the contents of one document from the reference to it in another document, is not applicable (*c*).] And again, in *Birch* v. *Ellames* (*d*), where the title-deeds of an estate were deposited with the plaintiff by way of security; and the defendant (fourteen years after) took a mortgage, with actual notice of the deposit with the plaintiff (but without inquiring the purpose for which the deposit was made),—The Court upheld the plaintiff's charge.

Absence of the title-deeds,—precautions to observe.

But the mere absence of the title-deeds, has never been held sufficient of itself to affect a person with notice, if he has *bonâ fide* inquired for the deeds, and a reasonable excuse has been given for the non-delivery of them,—For the Court cannot in such a case, impute to that person either fraud or negligence (*e*): *Secus*, if he omit all inquiry as to the title-deeds (*f*). And as regards registered lands, the law appears to be, that although you are under a duty to call for and to inspect all documents of which a memorial has been registered (*g*), yet you are under no duty to inquire as to documents which have not been registered (*h*),—assuming, of course, that (in the latter case) you have no actual notice of them. Also, a distinction has sometimes been taken, between wills and marriage settlements,—it being said, that if you have

(*a*) 1 Ch. Ca. 287.
(*b*) *Ward* v. *Valletort Co.*, 1903, 2 Ch. 654.
(*c*) *London Joint Stock Bank* v. *Simmons*, 1892, A. C. 201.
(*d*) 2 Anstr. 427.
(*e*) *Spencer* v. *Clarke*, 9 Ch. D. 137.
(*f*) *Oliver* v. *Hinton*, 1899, 2 Ch. 264.
(*g*) *Kettlewell* v. *Watson*, 26 Ch. Div. 501.
(*h*) *Agra Bank* v. *Barry*, L. R. 7 H. L. 135.

notice of a settlement, but are told it does not affect the property, you are safe in omitting to inspect the settlement; but that you are not safe (on your purchase from the heir-at-law of a testator) in omitting to inspect the will of which you have notice (*i*). And, generally, where a deed which is abstracted recites prior deeds which are not abstracted, the purchaser (or the mortgagee) will be taken, of course, to have notice of these prior deeds; but if the abstracted deed is (say) sixty years old,—or (now) forty years old,—and there is nothing to suggest that the title is bad (or is affected by the prior deeds), you may assume that there is nothing in them which concerns you (*k*).

Lessee has constructive notice of lessor's title.

A lessee has (and necessarily has (*l*)) constructive notice of his lessor's title,—*Scil.*, because, if a man who purchases a fee simple is bound to look into the title in a regular way, so also is a man who takes a lease for 1,000 years, or for twenty-one years, or any other lease; and the most express statement (made by the lessor to the lessee), that there are no restrictive covenants, affecting his (the lessor's) title, will not save the lessee from being affected with constructive notice of them, if there are any (*m*): That is to say,—Before the Vendor and Purchaser Act, 1874, the lessee was frequently debarred from looking into the lessor's title,—and since that Act, he cannot (unless he expressly stipulate to see it) look into that title; but in either case, his not looking into the title amounts to the same thing as closing his eyes to avoid inquiry.

Notice of occupation or tenancy,—effect of.

Also, knowledge by the purchaser, that the land is in the occupation or tenancy of any one, is constructive notice of the terms of such occupation or tenancy,—That is to say, so far as such terms may affect the subsequent relations between the purchaser (completing his contract) and the occupying tenant only,—but not so as to exempt

(*i*) *Jones* v. *Smith*, *supra*.
(*k*) *Prosser* v. *Watts*, 6 Madd. 59.
(*l*) *Patman* v. *Harland*, 17 Ch. D. 353, on p. 357.
(*m*) *In re Cox and Neve's Contract*, 1891, 2 Ch. 109.

the vendor from the duty of disclosing the terms of the tenancy to the purchaser (*n*): And notice of such occupation or tenancy is constructive notice also of any agreement which the occupying tenant may hold for the purchase of the property (*o*),—or (in fact) of any other interest of the occupying tenant in the property (*p*): Also, knowledge by the purchaser, that the tenants in occupation pay their rents to some particular person (other than the assuming vendor) is notice,—and is *actual* notice,—of the title of such other person (*q*).

Notice that the property is a residue,—or is a trust fund,—effect of.

It will be remembered also, that upon any assignment of the residue under a will, the assignor takes subject to the unpaid costs and debts,—and generally to all the equities affecting the residue (*r*): And it is here to be further remembered, that when you take a conveyance (whether as purchaser or as mortgagee) of the share of a beneficiary *who happens to be also a trustee,* you take subject to,—and (in effect) have constructive notice of,—all the trusts affecting that share,—So that the legal estate which you get from that trustee will not protect you against (*e.g.*) a prior equitable mortgage of the share (*s*),—or, *semble,* against the beneficiaries themselves (*t*).

(3) Notice to agent, &c., notice to principal,—when, and when not?

There is a third species of constructive notice,—That is to say, notice to an *agent* is sometimes held to be constructive notice to his *principal;* and this is generally so, where the same agent is concerned (in the case of sales) for both vendor and purchaser (*u*),—or (in the case of mortgages) for both lender and borrower (*x*),—an agent so circumstanced being usually called the "*common agent.*" But the imputation of constructive notice is in this case also merely a presumption of fact; and the

(*n*) *Caballero* v. *Henty,* L. R. 9 Ch. App. 447.
(*o*) *Daniels* v. *Davison,* 16 Ves. 249.
(*p*) *Allen* v. *Anthony,* 1 Mer. 282.
(*q*) *Hunt* v. *Luck,* 1902, 1 Ch. 428.
(*r*) *Supra,* p. 53.
(*s*) *Perham* v. *Kempster,* 1907, 1 Ch. 373.
(*t*) *Cap ll* v. *Winter,* 1907, 2 Ch. 376.
(*u*) *Spencer* v. *T pham,* 2 Jur. N. S. 865.
(*x*) *In re Hampshire Land Co.,* 1896, 2 Ch. 743.

presumption may be rebutted,—By showing (*e.g.*), that the agent had been guilty of some fraud, the communication of which to his principal could not be reasonably assumed (*y*),—a principle which has been recognised also in the Partnership Act, 1890 (*z*), whereby it is enacted, that notice to the active partner is notice to all the partners, *unless the active partner is designing a fraud.*

However, when the agent is the solicitor of the party, *and the fraud of the solicitor is in the actual transaction itself,* it is not competent for the client to escape the effect of the constructive notice (*a*): Nor will he escape, if the defect (or irregularity) is of so glaring a character, that any one would have necessarily discovered it (*b*): Also, the most positive proof, that the agent did not, in fact, communicate the notice to his principal, will not (in this class of cases) excuse (or protect) the principal (*c*), —*Scil.*, in a matter within the scope of the agent's authority.

"Common agent,"—notice through.

Where the common agent is (*e.g.*) the *secretary* of both the borrowing and the lending company, and he has personal notice of some irregularity which (if known to the lending company before the loan) would be fatal to the validity of the loan,—*and he fails to communicate his knowledge of the irregularity to the lending company,* —The Court will not impute to the lending company a knowledge of the irregularity (*d*),—*Scil.*, Because the lending company may reasonably assume, that all preliminaries to the loan (being matters of *internal* management of the borrowing company) have been duly observed (*e*): And the Court has gone so far as to say, that (in the case of such *common* agent), if notice is to be imputed to the principal, the agent must be one who has authority both to *give* the notice on behalf of the one principal, and to *receive* it on behalf of the other,—

(*y*) *In re Cousins*, 31 Ch. D. 671.
(*z*) 53 & 54 Vict. c. 39, s. 16.
(*a*) *Dixon* v. *Winch*, 1900, 1 Ch. 736.
(*b*) *Kennedy* v. *Green*, 3 My. & K. 699.
(*c*) *Bawden* v. *London, &c. Assurance*, 1892, 2 Q. B. 534.
(*d*) *Simpson* v. *Molsons' Bank*, 1895, A. C. 270.
(*e*) *Royal British Bank* v. *Turquand*, 6 El. & Bl. 327.

and failing either of these duties, the notice will not be imputed (*f*). Also, the mere fact that only one solicitor was employed in the particular transaction, does not make him the common agent (or common solicitor) for both (*g*),—*Scil.*, because, as regards the one of them, he may be the *ad hoc* solicitor only (*h*).

Constructive notice,—under the Conveyancing Act, 1882.

And, generally, as regards constructive notice through a man's solicitors or counsel, if it is desired to affect in equity the principal with notice of something *anterior*, the notice must have been of something which the solicitor (or his counsel) could be reasonably expected to have then mentioned to his principal (*i*): In other words, the knowledge must have been *so material* to the transaction which was then in progress, *as to have made it the* DUTY *of the agent to have communicated it to his principal:* For example, the transferee of a first mortgage would not be affected by his then knowledge of an incumbrance *subsequent* to the first mortgage,—so as to prevent the transferee from afterwards making a further advance,—such knowledge not having been material to the business of the transfer, for which business alone the solicitor was then acting (*k*). And now, by the Conveyancing Act, 1882 (*l*), s. 3, a purchaser (or a mortgagee) shall not be affected by notice,—Unless the instrument or thing is within his own knowledge,—or would have come to his own knowledge, if reasonable inquiries and inspections had been made by him; Or unless (*in the same transaction*) the instrument or thing has come to the knowledge of his counsel as such, or to the knowledge of his solicitor (or other agent) as such,—or would have come to the knowledge of his solicitor (or other agent) as such, if reasonable inquiries and inspections had been made by him (*m*): In other words, the doctrine of constructive notice is not to be applied in a wild sort of way, in order to invalidate a purchase or a mortgage (*n*).

(*f*) *Fenwick's case*, 1902, 1 Ch. 507.
(*g*) *Perry* v. *Hole*, 2 De G. F. & J. 38.
(*h*) *Kettlewell* v. *Watson*, 21 Ch. D. 685.
(*i*) *Fuller* v. *Bennet*, 2 Hare, 394.
(*k*) *Wylie* v. *Pollen*, 32 L. J. (Ch.) N. S. 782.
(*l*) 45 & 46 Vict. c. 39.
(*m*) *Bailey* v. *Barnes*, 1894, 1 Ch. 25.
(*n*) *Mogridge* v. *Clapp*, 1892, 3 Ch. 382.

Tacking.

II. *The Doctrine of Tacking.*—The usual effect of tacking is, to enable a third mortgagee, who buys up a first mortgage, to squeeze out the second or *mesne* (*i.e.*, intervening) mortgage,—and thereafter to insist upon being paid the aggregate amount of the first and third mortgage debts before the second mortgagee gets paid anything at all. And the principle is this, namely,—That where the equities are equal, the law shall prevail,—*In æquali jure, melior est conditio possidentis;* and as the third mortgagee comes in upon a valuable consideration and without notice, therefore, by getting in the first mortgage (being a *legal* mortgage), he shall protect his honest third mortgage debt.

(1) Third mortgagee without notice of second, buying in first mortgage with notice of second, may tack.

There are three leading rules of the doctrine (*o*), namely:—(1) Firstly, If a third mortgagee buys in the first mortgage (being a *legal* mortgage), though it be pending an action by the second mortgagee to redeem the first (*p*),—but not after a decree or judgment for an account or for settling the priorities (*q*),—yet the third mortgagee (having obtained the first mortgage, and got the law on his side and equal equity) shall squeeze out the second mortgagee,—the legal estate so obtained by the third mortgagee being looked upon as a "*tabula in naufragio,*" by means of which the third mortgagee escapes from the shipwreck of his third mortgage: And although the third mortgagee gets in the first mortgage *with notice*, he shall, nevertheless, be allowed to tack,—equity only requiring that *the third mortgagee shall not have had notice of the second mortgage* AT THE TIME OF LENDING HIS MONEY on the third mortgage; and he does not, in fact, look about him, until that loan is found to be in danger. But if an owner (having the legal estate) create a charge in favour of A., and then a second charge in favour of B., and then a third charge in favour of C.,—He cannot (*by his own voluntary act*) alter the equities between A., B., and C.,—by transferring the legal estate

(*o*) *Brace* v. *Duchess of Marlborough*, 2 P. W. 491.
(*p*) *Belchior* v. *Renforth*, 6 Bro. P. C. 28.
(*q*) *Bristol* v. *Hungerford*, 2 Vern. 524.

to any one of them (*r*); and the Land Transfer Act, 1897, appears to have in no way altered this rule (*s*). Apparently, also, if the puisne mortgagee, who gets in the legal estate, gets it in *in autre droit*, he cannot use it for any purpose of tacking (*t*).

(2) Judgment creditor buying in the first mortgage, shall not tack.

(2) Secondly, If a judgment-creditor buys in the first mortgage (although being a *legal* mortgage), he shall not tack his judgment to the mortgage,—*Scil.*, because a judgment-creditor *does not lend his money on the immediate view or contemplation of the land*; and the effect of the judgment is, in fact, to charge only *the interest which at the time remains* in the debtor (*u*).

(3) First mortgagee, lending a further sum on a judgment, may tack against a mesne mortgagee.

(3) But, Thirdly, If a first mortgagee (being a *legal* mortgagee) lends a further sum to the mortgagor upon a judgment, he shall retain against a mesne mortgagee until both his securities are satisfied (*x*),—and *a fortiori*, if the first mortgagee lends the further sum on a mortgage: But the rule will not apply, if the mortgagee (or any of the co-mortgagees (*y*)) had *notice* of the mesne incumbrance *at the time of making his further advance* (*z*),—So much so, that, although the first mortgage should have been to secure a sum *and further advances*, still if the first mortgagee (at the time of making any further advance) *have notice* of the mesne incumbrance, he will not be entitled to tack such further advance (*a*),—not even when he was under an *obligation* to make the further advance (*b*): And this rule is applicable even as against banks, in respect of the bank's lien on the shares of a customer for moneys due *and growing due* from the customer (*c*).

As to "floating securities" of a company.

As regards the mortgage debentures of a company, these are in the nature of a "*floating security*" only,—

(*r*) *Shropshire Rail. Co.* v. *Reg.*, L. R. 7 H. L. 496.
(*s*) *Capital & Counties Bank* v *Rhodes*, 1903, 1 Ch. 631.
(*t*) *Morret* v. *Paske*, 2 Atk. 52.
(*u*) *Whitworth* v. *Gaugain*, 3 Hare, 416.
(*x*) *Shepherd* v. *Titley*, 2 Atk. 348.
(*y*) *Freeman* v. *Laing*, 1899, 2 Ch. 355.
(*z*) *Credland* v. *Potter*, L. R. 10 Ch. App. 8.
(*a*) *Rolt* v. *Hopkinson*, 9 H. L Cas. 514.
(*b*) *West* v. *Williams*, 1899, 1 Ch. 132.
(*c*) *Bradford Bank* v. *Briggs*, 12 App. Ca. 29.

They will therefore not have priority either over a sale (*d*), or over a mortgage (*e*), of any specific part of the company's property,—not even, *semble*, over an execution duly perfected (*f*), or a garnishee order duly perfected (*g*), —For the very intention of a "floating security" is, that *it shall affect only the property of the company which shall be and remain the unincumbered property of the company at the time of the realisation of the security* (*h*): But, in respect of the specific real estate specifically comprised in and mortgaged by the debenture trust deed, that deed would (on being put in force) have priority over a subsequent mortgage (*i*). Also, any provision contained in the debenture (whereby the company should be restrained from making such specific sale or mortgage as aforesaid) would not prevent a charge which (like the solicitor's lien) arises by operation of law (*k*), or any voluntary charge taken WITHOUT notice (*l*), or a mortgage taken (with or without notice) on after-purchased land, for the vendor's lien thereon for his unpaid purchase-money (*m*): But otherwise the provision, whether contained in the debenture itself or in the trust-deed for securing the debenture, being duly registered as the mortgage of the company would, *semble*, prevail (*n*).

By the 8 Edw. VII. c. 69, s. 107 (continuing the like provision of the 60 & 61 Vict. c. 19), floating securities are (in all cases) subject to the debts which (upon the bankruptcy of an individual) are entitled to be paid in preference to the general debts of the company; and these preferential payments are enumerated in s. 209 of the Act (being the Companies Consolidation Act, 1908); but the debentures are to be recouped (as against the *unsecured* creditors) the amount taken by these preferential debts.

Floating securities, as between themselves, rank,—as a

(*d*) *In re Horne and Hellard's Contract*, 29 Ch. Div. 736.
(*e*) *Wheatley* v. *Silkstone, &c. Co.*, 29 Ch. Div. 715.
(*f*) *Taunton* v. *Sheriff of Warwickshire*, 1895, 1 Ch. 734.
(*g*) *Robson* v. *Smith*, 1895, 2 Ch. 118.
(*h*) *Evans* v. *R. G. Quarries, Limited*, 1910, 2 K. B. 979.
(*i*) *In re Ind, Coope & Co.*, 1911, 2 Ch. 223.
(*k*) *Brunton* v. *Electrical Corporation*, 1892, 1 Ch. 434.
(*l*) *English and Scottish Mercantile* v. *Brunton*, 1892, 2 Q. B. 700.
(*m*) *Wilson* v. *Kellard*, 1910, 2 Ch. 306.
(*n*) *Wilson* v. *Kellard*, *supra*.

general rule (*o*), but not invariably (*p*),—according to the respective dates of their respective issues,—each subsequent issue being (and being expressed to be) subject to the prior issue or issues (*q*). These floating securities, pending their realisation, may, however, be diversely protected,—*Scil.*, by the appointment of a receiver and otherwise,—and against executions even (*r*); but they must (for this purpose) have been duly filed, and also registered (*s*), —otherwise they will not be entitled to any priority over the general creditors.

The following further points with regard to tacking must now be mentioned, that is to say:—

In building society mortgages,—tacking was at one time not recognised;

(1) It used to be considered, that no tacking (properly so called) existed, where the first mortgage was to a building society and was paid off by the third mortgagee, and the society thereupon either executed the due re-conveyance or indorsed on the mortgage the due statutory receipt; but such third mortgagee (it was considered) had priority only for the sum paid to the building society (with interest thereon (*t*)),—That is to say, the legal estate, obtained by virtue of the statute, was deemed to have been obtained for the benefit of *all* the mortgagees according to the priority of their dates (and for the benefit of no one of them in particular): But the old opinion (which was a very reasonable one) has been now held to be erroneous (*u*),—excepting as regards the re-vesting of the legal estate (*x*): And, therefore, when the building society indorses the statutory receipt, and a new mortgage is made (*without notice of a mesne mortgage*) to a third person, who pays off the society and who takes over all the title-deeds from the society, the new mortgage ranks as the

but is now recognised, *semble*.

(*o*) *Lister* v. *Lister Co.*, 1893, W. N. 33.
(*p*) *Cox Moore's case*, 1908, 1 Ch. 604.
(*q*) *Ward* v. *Valletort Co.*, 1903, 2 Ch. 654.
(*r*) *Davey* v. *Williamson*, 1898, 2 Q. B. 194.
(*s*) 8 Edw. VII. c. 69, ss. 93, 100.
(*t*) *Pease* v. *Jackson*, L. R. 3 Ch. App. 576.
(*u*) *Hosking* v. *Smith*, 13 App. Ca. 582.
(*x*) *Crosbie-Hill* v. *Sayer*, 1908, 1 Ch. 866.

first mortgage, *not only for the amount paid to the society, but for the whole sum secured by the new mortgage.*

Mortgages with a surety,—distinction as regards tacking, according as the surety is a mere covenantor, or is also a co-mortgagor.

(2) Regarding mortgages with a surety, some rather nice distinctions require to be taken: For, if A. is the mortgagor, B. the surety, and C. the mortgagee, and B. (as surety) merely covenants to pay the mortgage debt; and C. lends a further sum to A.,—C. will in general have the right, *as against B.*, to tack the further advance to the first mortgage debt (*y*): But if A. is the mortgagor, B. the surety, and C. the mortgagee,—and B. not merely covenants for payment of the debt, *but is also a co-mortgagor with A.* bringing some property of his (B.'s) own into the security,—Then if C. lends a further sum to A., C. cannot, *as against B.*, tack this further advance to the first mortgage debt,—*Scil.*, Because (in this latter case) B. has not merely a right (on payment of the first mortgage debt) to delivery up of the security, but has an equity of redemption, which is good and valid as against C. even (*z*).

When a bond debt may be tacked,—(a) During life of debtor,—never. (b) After death of debtor,—only as against volunteers.

(3.) A prior mortgagee, who holds also a bond debt, cannot tack the bond debt to his mortgage debt,—either as against any intervening incumbrancer or as against an intervening judgment-creditor or bond creditor,—or even as against the mortgagor himself,—But can tack it, only as against the heir or beneficial devisee of the deceased mortgagor,—and that only for the purpose of avoiding circuity of action (*a*): In other words, a bond debt (or, in fact, any other unsecured debt) cannot be tacked at all,—*Scil.*, during the life of the mortgagor, but only after his death and upon an administration of his assets,—when it will be preferred, of course, to the heir or beneficial devisee of the deceased (*b*): But a debt for which judgment had been obtained might be so tacked,—*Scil.*, as against the general creditors of the deceased (*c*).

(*y*) *Williams* v. *Owen*, 13 Sim. 597; *Nicholas* v. *Ridley*, 1904, 1 Ch. 192.
(*z*) *Bowker* v. *Bull*, 1 Sim. N. S. 29; *Noyes* v. *Pollock*, 32 Ch. D. 53.
(*a*) *Talbot* v. *Frere*, 9 Ch. Div. 568.
(*b*) *In re Gregson*, 36 Ch. Div. 223.
(*c*) *In re Haselfoot*, L. R. 13 Eq. 327.

Tacking, non-existent under Yorkshire Registries Act, 1884.

(4) It follows from the provisions of the Yorkshire Registries Act, 1884 (*d*), that (as regards all lands in Yorkshire) the doctrine of tacking is wholly abolished, it having been provided by the Act, that, as between the successive mortgages,—legal or equitable,—and including liens,—the date of registration shall determine the order of priority, *excepting in cases of actual fraud;* and, for the same or the like reason, there will (*now*) be no tacking as regards charges which have been created (and duly registered in the Land Registry) under the Land Transfer Act, 1897: *Sed quære.*

Actions to establish priorities.

(5) In a suit or action to establish priorities as between successive mortgagees, the Court has regard to the doctrine of tacking, to the doctrine of notice, and to every other relevant consideration; and therefore, although (as between successive mortgagees) the first in time retains, in general, his priority, yet he may lose his priority—either for fraud (*e*) or for gross negligence (*f*): For example, where a mortgagee of leasehold property lent the lease to the mortgagor,—*for the purpose of obtaining a further advance upon it, and on the assurance of the mortgagor that he would inform the lender of the prior charge;* and the mortgagor (breaking faith with the mortgagee) deposited the lease with his bankers, *without informing them of the prior charge,*—It was held, that negligence of this sort (on the part of the prior mortgagee),—*negligence which had put it in the power of the mortgagor to commit the fraud,*—postponed his mortgage to the security of the bankers (*g*). And even a legal mortgagee may be so postponed,—*Scil.*, by some *positive* act of the mortgagee conducing directly to the fraud (*h*),—but not without some such *positive* act (*i*). And note, that, in these actions to establish priorities, a plaintiff, although unsuccessful in establishing his own priority, may (and usually will) get his costs of the action, *if the*

Priority may be lost by mortgagee's fraud;

or by his negligence inducing deception.

(*d*) 47 & 48 Vict. c. 54.
(*e*) *Ratcliffe* v. *Barnard*, L. R. 6 Ch. App. 652.
(*f*) *Oliver* v. *Hinton*, 1899, 2 Ch. 264.
(*g*) *Briggs* v. *Jones*, L. R. 10 Eq. 92.
(*h*) *Dixon* v. *Winch*, 1900, 1 Ch. 736.
(*i*) *Shropshire Union Rail.* v. *Reg.*, L. R. 7 H. L. 496.

proceedings therein have enured for the benefit of the other mortgagees, and some proceedings of the sort were absolutely necessary to be taken by some one (*k*).

Solicitor's negligence,—effect of.

And (6) A solicitor is usually liable for negligence, in not discovering a mesne or prior mortgage (*l*),—or in not seeing that the security which he takes is a sufficient security (*m*). And if he take a cheque in payment, it is negligence in him, to part with the deeds before the cheque is cashed (*n*),—*Scil.*, in the absence of any specific authority to do so; and a tender by cheque, where the solicitor's authority is only to receive payment in cash, is not to be accepted. And, for any such negligence by a solicitor, the remedy may occasionally be summary (*o*); but, far more usually, the formal remedy by action is resorted to,—especially when it is sought to recover *damages* for the negligence (as distinguished from requiring the solicitor to merely make good some defalcation or the like (*p*)).

Consolidation of mortgages: Mortgagor must redeem *all* the mortgages which the mortgagee holds on his property.

III. *The Consolidation of Mortgages.*—As regards all mortgages made prior to January 1, 1882, the general rule in equity was, that (both in suits for foreclosure and in suits for redemption) the mortgagee could consolidate a mortgage on A. and a mortgage on B., and insist on being paid both mortgages or neither,—that is, could always "*consolidate*" these two mortgages,—as against the original mortgagor, and also as against the trustee in the bankruptcy of that mortgagor (*q*), and also as against any other assignee of the mortgagor, who was an assignee of both A. and B. (*r*). But where the mortgagor's assignee was of A. only, or was of B. only, the mortgagee could, *as against that assignee,* consolidate only if both the mortgages had united in him (the mort-

(*k*) *Batten* v. *Dartmouth Commissioners*, 45 Ch. Div. 612.
(*l*) *In re Dangar's Trusts*, 41 Ch. Div. 178.
(*m*) *Dooby* v. *Watson*, 39 Ch. D. 178.
(*n*) *Pape* v. *Westacot*, 1894, 1 Q. B. 272.
(*o*) *Dixon* v. *Williamson*, 4 De G. & J. 508.
(*p*) *Marsh* v. *Joseph*, 1897, 1 Ch. 213.
(*q*) *Selby* v. *Pomfret*, 1 J. & H. 336.
(*r*) *Vint* v. *Padgett*, 2 De G. & J. 611; *Pledge* v. *White*, 1899, A. C. 187.

gagee) *before* the date of the execution of the assignment (*s*), and not after that date: Also, there never was any right of consolidation, either (1.) where there had been no default (*t*); or (2.) where one of the mortgages had ceased to exist (*u*),—or was not yet existing (*x*).

Consolidation, —abolition of, under Conveyancing Act, 1881.

And, now, under the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 17,—*unless the effect of the Act is expressly excluded or varied* (*y*),—a mortgagor, as regards mortgages made (or one of which is made) on or after the 1st January, 1882, if he seek to redeem any one mortgage, is entitled to do so, without paying any money due under any separate mortgage, made by him (or by any person through whom he claims) on property other than that comprised in the mortgage which he seeks to redeem; and, as regards the costs and charges of the mortgagee (being costs and charges which he is entitled to add to his security) these also will not, *now*, be consolidated,—excepting where (and so far as) the principal and interest may be consolidated (*z*).

Consolidation, —leaning of the Courts against.

Even before the 1st January, 1882, the Courts had begun to regard with disfavour the doctrine of the consolidation of mortgages (*a*); and since that date, when a case comes before the Court to which the provisions of the Act of 1881 are inapplicable, the Court inclines very strongly against the doctrine,—and will (if, on any decent pretext, it can) decide against the right to consolidate,—on the pretext (*e.g.*), that the mortgagors were distinct persons originally, and only latterly became one and the same person (*b*): However, notwithstanding all that, the right to consolidate (which is often a valuable one for mortgagees) may be diversely preserved,—either by uniformly (in every mortgage) excluding the provisions of the Act of 1881,—which is the simplest thing to do,—or else, on every occasion of a new mortgage,

(*s*) *Harter* v. *Coleman*, 19 Ch. D. 630.
(*t*) *Cummins* v. *Fletcher*, 14 Ch. Div. 699.
(*u*) *In re Raggett*, 16 Ch. Div. 117.
(*x*) *Jennings* v. *Jordan*, 6 App. Ca. 698.
(*y*) *Hughes* v. *Britannia Society*, 1906, 2 Ch. 607.
(*z*) *De Caux* v. *Skipper*, 31 Ch. Div. 635.
(*a*) *Baker* v. *Gray*, 1 Ch. D. 491.
(*b*) *Sharp* v. *Richards*, 1909, 1 Ch. 109.

obtaining a transfer of (and expressly, for this purpose, keeping alive) the old securities:

No *compulsory* redemption of one only of the mortgaged properties.

And here it is to be observed, that where real and personal estates are mortgaged together, and the mortgagor dies (leaving a will of personalty but intestate as to his real estate), and the mortgagee enters into possession,—The executrix of the mortgagor is entitled to redeem the whole of the mortgaged property, even although the mortgagee may insist that her only right is to redeem the personal estate in mortgage,—*Scil.*, because she (the executrix) *cannot insist on redeeming the personal estate separately, her right (and her duty) being to redeem the whole, subject to the equities of the persons interested* (*c*): In other words, the rule still is, "*all or none*," where you come to redeem.

Special remedies of mortgagee,—(a) Foreclosure.

Equity having determined that the mortgagor should be relievable on payment of principal interest and costs, it was only just, that (after a fair and reasonable time given to the mortgagor to discharge the debt) he should be foreclosed his equity of redemption: Which remedy by foreclosure is in respect of the mortgagor's default,—and is therefore available only after default,—*i.e.*, after the *legal* right of redemption is gone (*d*): And, *nota bene*, the remedy is not available at all against the crown, in respect of mortgaged estates which have escheated to the crown (*e*)); but (all the same) the crown, acquiring title by escheat, takes subject to the mortgage (*f*).

Foreclosure action,—nature of, and time for;

In the action of foreclosure, when the plaintiff is a first mortgagee, he makes all the subsequent mortgagees (including even debenture holders (*g*)) co-defendants with the mortgagor,—there being no piecemeal foreclosure, nor piecemeal redemption, save by consent (*h*). An inter-

(*c*) *Hall* v. *Heward*, 32 Ch. Div. 430.
(*d*) *Lisle* v. *Reeve*, 1902, 1 Ch. 53; *Turnell's case*, 1908, 2 Ch. 62.
(*e*) *Lutwich's case*, 2 Atk. 223.
(*f*) *Reeve* v. *Att.-Gen.*, 2 Atk. 223.
(*g*) *Wallace* v. *Evershed*, 1899, 1 Ch. 891.
(*h*) *Caddick* v. *Cooke*, 32 Beav. 70.

mediate mortgagee also is entitled to commence the action,—*Scil.*, against the mortgagor and all mortgagees *subsequent* to himself (*i*); and in this action, he usually offers to redeem any mortgagees *prior* to himself (whom, for this purpose, he makes parties to the action): The action for foreclosure, where the mortgagor is bankrupt, may be brought in the Chancery Division,—although the remedy may also (in such a case) be obtained in the Bankruptcy Division (*k*).

and judgment in.

The judgment for foreclosure directs the necessary account, to ascertain what is due to the plaintiff-mortgagee,—giving any special directions, where there are special circumstances which will affect the account; and the judgment directs foreclosure, in case of failure to pay the amount which (on the account) shall be found due: And, *nota bene*, the mortgagor may insist on the account being taken, although the taking thereof may be merely vexatious; but the Court may (in its discretion) stay the account (*l*),—with liberty to apply. If the mortgagor should have commenced an action to redeem the mortgagee, and he should eventually fail to redeem, his action will be dismissed with costs,—and the dismissal operates (but in the case of *legal* mortgages only) as a complete foreclosure (*m*).

Successive redemptions,—complications (and surprises) in working out the foreclosure judgment.

The working out of the foreclosure judgment,—in cases of complication,—is usually full of surprises: Thus, in *Titley* v. *Davies* (*n*), where three estates were mortgaged to S.; and afterwards one of them was mortgaged to the plaintiff T.; and then another of them was sold to P.; and then the third one was mortgaged to the defendant D.,—The Court said; (1) That T. could redeem S.,—and thereafter hold all the three estates against both P. and D.; and (2) That P. could redeem T.,—and thereafter not only hold his own purchase free of redemption, but also require D. to redeem him (or else be foreclosed) as regards the other two properties. And in *Bugden* v.

(*i*) *Greenough* v. *Littler*, 15 Ch. Div. 93.
(*k*) *Ex parte Fletcher*, 10 Ch. Div. 610.
(*l*) *Exchange, &c. Ltd.* v. *Land Financiers*, 34 Ch. D. 195.
(*m*) *Marshall* v. *Shrewsbury*, L. R. 10 Ch. App. 250.
(*n*) 2 Y. & C. C. C. 399.

Bignold (*o*), there was the like sort of surprise, in a case of the like complication. Also, in *Flint* v. *Howard* (*p*), where two estates were mortgaged to the defendant H.; and afterwards one of them was mortgaged to the plaintiff F.; and then the other was mortgaged to the defendant H.; and the plaintiff F. (as regards the estate in mortgage to him) foreclosed the mortgagor,—and claimed to redeem the defendant H.,—The Court said, (1) That F. could redeem H. (his first mortgage),—and thereafter hold the foreclosed estate free of redemption, and at the same time require H. (in respect of H.'s second mortgage) to redeem him (or else be foreclosed) as regards the other of the two estates,—but H. was to pay only (for such redemption) a due and rateable proportion of the aggregate mortgage debt (the proportion to be ascertained on the basis of the relative values of the two estates).

Debenture holders,—their remedy.

The remedy of a debenture holder is, usually (upon a declaration of charge first made (*q*)) the appointment of a receiver (*r*), and sometimes of a manager (*s*); but he may also (in a proper case) have a winding-up order (*t*), or a sale of the undertaking (*u*),—but not if the company is a school (*x*), or is a Tramway Company (*y*), or a Waterworks Company (*z*), or a public company generally,—at least, in general (*a*).

Judgment for foreclosure, and personal judgment for the mortgage debt,—combination of.

A mortgagee being (since the Judicature Acts) entitled to combine in one action his right to foreclosure with his right to a personal judgment on the mortgagor's covenant (or bond) for payment of the debt,—so much so that (if he bring two actions instead of one action) he will have one of his actions stayed (*b*),—The form of judg-

(*o*) 2 Y. & C. C. C. 377.
(*p*) 1893, 2 Ch. 54.
(*q*) *Marwick* v. *Lord Thurlow*, 1895, 1 Ch. 776.
(*r*) *In re H. Pound & Co.*, 42 Ch. Div. 402.
(*s*) *Leas Hotel case*, 1902, 1 Ch. 332.
(*t*) *Sadler* v. *Warley*, 1894, 2 Ch. 170.
(*u*) *Elias* v. *Oxygen Co.*, 1897, 1 Ch. 511.
(*x*) *Hornsey District Council* v. *Smith*, 1897, 1 Ch. 843.
(*y*) *Marshall* v. *South Staffordshire Tramway Co.*, 1895, 2 Ch. 36.
(*z*) *Blaker* v. *Herts Waterworks*, 41 Ch. D. 399.
(*a*) *Central Ontario Railway case*, 1905, A. C. 576.
(*b*) *Williams* v. *Hunt*, 1905, 1 K. B. 512.

ment (*Scil.*, against the mortgagor who has covenanted to pay the debt,—but not against any mere transferee of the equity of redemption (*c*)), is as follows:—

Firstly, if the amount of the mortgage debt is either proved admitted or agreed at the trial or hearing, the plaintiff recovers against the defendant the debt, and also so much of his taxed costs of the action as would have been incurred if the action had been brought for such payment only,—the judgment carrying interest at the rate of 4 per cent. per annum (*d*).

Secondly, if the amount of the mortgage debt is not proved admitted or agreed at the trial or hearing, an account is taken of what is due to the plaintiff for principal and interest under the covenant to pay; and the plaintiff recovers against the defendant the amount which shall be certified to be due to him on taking that account, and also so much of his taxed costs as would have been incurred if the action had been brought for payment only: And, then,—

Thirdly, whether the amount of the mortgage debt is or is not proved admitted or agreed at the trial or hearing, the judgment proceeds to direct an account of what is due to the plaintiff under and by virtue of his mortgage security and for his taxed costs of the action; and in taking such account, what (if anything) the plaintiff shall have received from the defendant under the personal judgment is to be deducted, and the BALANCE due to the plaintiff is to be certified, with interest to be computed at the rate reserved by the mortgage deed (*e*); and where the mortgagee is in possession at the date of the foreclosure judgment, the account directed to be taken will extend to the rents received by him (subject to all "*just allowances*" for his outlay or expenditure on the mortgaged property):

The defendant is usually allowed one month for payment under the personal judgment, and six months for

(*c*) *In re Errington*, 1894, 1 Q. B. 11.
(*d*) *Economic Life* v. *Usborne*, 1902, A. C. 147.
(*e*) *Economic Life* v. *Usborne*, *supra*.

redemption under the foreclosure judgment: And if any rents shall have been received by the mortgagee after the certificate of the amount due, and *before* (*f*) (but not *after* (*g*)) the day which (by the certificate) is fixed for redemption, a new day for redemption must be fixed,—and a new (supplementary) account taken of what is due; but the necessity for that supplementary account may sometimes be obviated (*h*).

(b) Sale,—either,
(1) By order of the Court:

Before the statute 15 & 16 Vict. c. 86, equity refused, in general, to decree a sale against the will of the mortgagor; but (under that statute, s. 48) the Court of Chancery was enabled, *at the trial*, to direct a sale of the mortgaged property instead of a foreclosure thereof (*i*): And, *now*, by the Conveyancing Act, 1881, s. 25, the sale may be directed *even upon an interlocutory application* (*k*), —and either in a foreclosure or in a redemption action (*l*); and (when there are successive mortgages) without previously determining the *priorities* of the incumbrancers.

Or, (2) Under power of sale in the mortgage deed.

A power to sell the mortgaged hereditaments is also usually inserted in the mortgage deed itself; and the concurrence of the mortgagor in the sale is not (in such a case) necessary to perfect the title of the purchaser (*m*). The mortgagee (selling under such an express power) is at liberty to retain to himself his principal interest and costs; and in case the net sale-proceeds are insufficient to pay the principal interest and costs, the mortgagee may apply the whole of them towards payment of his principal (so as to escape the income tax which would otherwise be payable on the arrears of interest (*n*)). But a mortgagee, who has obtained an order *nisi* for foreclosure, can only sell with the leave of the Court (*o*); and if he have obtained an order *absolute* for foreclosure, he cannot after-

(*f*) *Jenner Fust* v. *Needham*, 32 Ch. Div. 582.
(*g*) *Raper's case*, 1892, 1 Ch. 54.
(*h*) *Simmons* v. *Blandy*, 1897, 1 Ch. 19.
(*i*) *London and County Banking Co.* v. *Dover*, 11 Ch. Div. 204.
(*k*) *Woolley* v. *Colman*, 21 Ch. Div. 169.
(*l*) *Union Bank of London* v. *Ingram*, 20 Ch. Div. 463.
(*m*) *Newman* v. *Selfe*, 33 Beav. 522.
(*n*) *Smith* v. *Law Guarantee*, 1904, 2 Ch. 569.
(*o*) *Stevens* v. *Theatres, Ltd.*, 1903, 1 Ch. 857.

wards exercise the power of sale at all (*p*),—although, if he has acquired the equity of redemption by adverse possession only, he may still exercise his power of sale (*q*).

Surplus sale-proceeds,—the title to, and payment of, with interest thereon.

Where the mortgagee has lawfully and properly exercised his power of sale, and there is a surplus of the sale-proceeds, that surplus can only be retained by the selling mortgagee for his own benefit, when he has acquired (by adverse possession) the title to the equity of redemption; and otherwise the surplus must be paid over to the person or persons who (but for the sale) would have been entitled to redeem: And although a mortgagee is not (in general) a trustee for the mortgagor,—and, in particular, is not a trustee for the mortgagor as regards the exercise of the power of sale (*r*),—and that whether the mortgage is in the ordinary form or is in the form of a *trust for sale* (*s*),—Still the mortgagee is a trustee (although a constructive trustee only (*t*)) of the surplus sale-proceeds (if any); and he must exercise great care of that surplus, even when the mortgagor himself is the vendor, and he (the mortgagee) is merely receiving his mortgage money and releasing the property (*u*): Also, the mortgagee is liable to pay interest, on the surplus sale-proceeds, at the rate of 4 per cent. from the date of the completion of the sale (*x*).

Surplus sale-proceeds, erroneous payment of, effect of.

Where there was a mortgage of leaseholds by A. to B., and the mortgagor (who was a female) afterwards intermarried with C.; and C. died, leaving A. surviving; and B. as mortgagee then sold the leaseholds to the plaintiff; and (there being a surplus after satisfying B.'s mortgage debt) the plaintiff paid that surplus to C.'s executors,—A. afterwards compelled the plaintiff to pay the surplus over again to herself (obtaining judgment against him for the

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(*p*) *Watson* v. *Marston*, 4 De G. M. & G. 230.
(*q*) *Johnson* v. *Mounsey*, 11 Ch. D. 285.
(*r*) *Warner* v. *Jacobs*, 20 Ch. D. 220.
(*s*) *Locking* v. *Parker*, L. R. 8 Ch. App. 30.
(*t*) *Thorne* v. *Heard*, 1895, A. C. 495.
(*u*) *West London Bank* v *Reliance Society*, 29 Ch. Div. 954.
(*x*) *Charles* v. *Jones*, 35 Ch. Div. 544.

amount): Whereupon the plaintiff sued C.'s executors, to recover back from them the surplus which had been (erroneously) paid by him to them,—But the Court said, that he was not entitled to recover it (*y*).

Effect, where notice required to be given, before exercising power of sale.

If, by the terms of the power of sale contained in the mortgage deed, notice to the mortgagor is required to be given before exercising the power, the mortgagee (who should sell without giving such notice) would be liable in damages to the mortgagor or to his transferee (or "assign") of the equity of redemption (*z*): Usually, however, a *bonâ fide* purchaser from the selling mortgagee is (under the express words of the power) not affected by such notice not having been given,—or, in general, by any other neglect of the selling mortgagee: But, even so, any purchaser may (if he chooses to do so) take the objection that the due notice has not been given (*a*); and if the purchaser has *express* notice that the selling mortgagee has not given the due notice, the purchaser would not be safe in completing (*b*). Also, the mortgagee, when he is selling *bonâ fide*, may sell for the net amount of his mortgage debt (*c*).

The mortgagor (or one or two or more co-mortgagors), may (just like any puisne mortgagee may (*d*)) lawfully purchase from the mortgagee selling in *bonâ fide* exercise of his power of sale (*e*); but the mortgagee who is exercising the power of sale may not himself purchase (*f*),—although, if he should purport to purchase, and then afterwards should sell to a *bonâ fide* purchaser, the title of the latter will be good, the selling mortgagee becoming accountable (in such a case) to the mortgagor for the purchase-moneys paid by such subsequent purchaser (*g*).

(*y*) *Clare* v. *Lamb*, L. R. 10 C. P. 334.
(*z*) *Hoole* v. *Smith*, 17 Ch. Div. 434.
(*a*) *Life and Reversionary* v. *Hand in Hand*, 1898, 2 Ch. 230.
(*b*) *Selwyn* v. *Garfitt*, 38 Ch. Div. 273.
(*c*) *Melbourne Bank case*, 7 App. Ca. 307.
(*d*) *Supra*, p. 261.
(*e*) *Kennedy* v. *De Trafford*, 1897, A. C. 180.
(*f*) *Hodgson* v. *Deans*, 1903, 2 Ch. 647.
(*g*) *Astwood* v. *Cobbold*, 1894, A. C. 150.

Or, (3) Under statutory power of sale conferred by Conveyancing Act, 1881, ss. 19—22.

By the provisions of the Conveyancing Act, 1881, ss. 19, 20, 21, and 22, a power of sale has also been rendered incident to every mortgage or charge (by *deed*),—*Scil.*, unless where the deed itself expressly excludes these provisions; but the statutory power of sale is not to be exercised, until either (1) Notice requiring payment of the mortgage money has been given, and has been followed by three months' default (*h*); or until (2) Interest is in arrear for two months after becoming due; or until (3) There has been a breach of some provision (other than the covenant to repay) contained in the mortgage deed or in the Act.

Selling mortgagee,—may leave part of sale-proceeds outstanding.

Where a mortgagee sells under his power of sale, he sometimes leaves part of the purchase-money outstanding and unpaid; and he may do that well enough, provided he credit the mortgagor with the whole of the purchase-money as actually received (*i*): And the unpaid portion of the purchase-moneys is a matter which thereafter concerns only the mortgagee and the purchaser,—the selling mortgagee having a lien therefor on the purchased hereditaments; or, if the unpaid purchase-moneys are secured by a mortgage, the sale and the mortgage are (both of them) entirely good,—being, in fact, distinct transactions.

Last day outstanding,—conveyance of.

Where the selling mortgagee has only the equitable estate, he can convey only the estate which is in himself (*k*),—discharged of the equity of redemption, of course; but as regards mortgages of leaseholds, where the mortgage is by demise (leaving the last day, or last two or three days, outstanding), then, under Lord Cranworth's Act (23 & 24 Vict. c. 145), ss. 15, 16,—wherever that Act is applicable (but not otherwise),—the selling mortgagee can, by the exercise of his statutory power of sale, vest the whole original term of years (including the outstanding day or days) in the purchaser (*l*).

Or, (4) Under the Lands Clauses Consolidation Act,

When mortgaged property is taken by compulsory purchase under the provisions of the Lands Clauses Con-

(*h*) *Barker's ease*, 1908, 2 Ch. 20.
(*i*) *Thurston* v. *Maekeson*, L. R. 4 Q. B. 97.
(*k*) *In re Hodson and Howe*, 35 Ch. D. 668.
(*l*) *In re Solomon and Meagher*, 40 Ch. D. 508

solidation Act, 1845 (or under any special Act incorporating the provisions of that Act), the compensation moneys go to the mortgagee, including the proportion paid for the goodwill (if any) attaching to the premises (*m*),—assuming always that (and so far as) that goodwill is included in the mortgage (*n*), and is not a merely *personal* goodwill (*o*): And these compensation moneys are, in general (*p*),—but not invariably (*q*),—applicable (after interest in arrear has been paid, and after all costs paid) in reduction of the principal of the mortgage debt; and when the mortgage is a debenture (covered by a trust deed), the compensation moneys are payable to the trustees of the debenture deed (*r*). Similarly, where the compensation is payable in respect of the extinction of a public-house licence, that is capital money,—and is to be settled as the house itself was (and remains) settled (*s*).

1845,—compensation on compulsory purchase.

Where the mortgage deed contains an attornment clause (or contains a re-demise), the mortgagee may also (like a landlord for his rent) distrain upon the mortgaged premises (the distrainable articles thereon, whether belonging to the mortgagor or to any third person (*t*)),—for the arrears of his interest,—and sometimes even for a large part of his principal,—Provided only that the attornment clause be not fraudulent (*u*), and provided also that (as against a company which is in course of being wound up), the leave of the Court for the distress shall have first been obtained (*x*),—Which leave may, of course, be refused. But an attornment clause must (in general) be registered as a Bill of Sale (*y*); but the attornment clause, although unregistered, effectively creates the relation of landlord and tenant (*z*),—only the

(c) Distress,—for interest, and even for principal.

(*m*) *Pile* v. *Pile*, 3 Ch. Div. 36.
(*n*) *Clarke* v. *White*, 1899, 1 Ch. 316.
(*o*) *Cooper* v. *Metropolitan Board*, 25 Ch. D. 472.
(*p*) *Thompson* v. *Hudson*, L. R. 10 Eq. 497.
(*q*) *Wrigley* v. *Gill*, 1904, 1 Ch. 165.
(*r*) *Law Guarantee* v. *Mitcham Brewery*, 1906, 2 Ch. 98.
(*s*) *In re Bladon, Dando* v. *Porter*, 1911, W. N. 170.
(*t*) *Kearsley* v. *Phillips*, 11 Q. B. D. 621.
(*u*) *Ex parte Jackson*, 14 Ch. Div. 725.
(*x*) *Lee* v. *Roundwood Co.*, 1897, 1 Ch. 373.
(*y*) *Green* v. *Marsh*, 1892, 2 Q. B. 330.
(*z*) *In re Willis*, 21 Q. B. D. 384; *Lee* v. *Roundwood Co.*, *supra*.

tenancy thereby created determines with the death of the mortgagor (*a*),—or upon a transfer by the mortgagee (*b*). And here note, that a creditor obtaining a judgment for his debt and becoming thereafter a tenant by elegit, may distrain,—and may do so without any attornment of the occupying tenant (*c*).

(d) Administration action.

A mortgagee (seeing that he is a creditor) may also commence a creditors' action for the administration of the estate of the mortgagor (where the mortgagor is dead (*d*)), —and he will (in due course) get paid his mortgage debt in that action *pari passu* with the unsecured creditors,—valuing his security (or otherwise dealing with it), as explained in the chapter on the Administration of Assets, —where the mortgagor is dead insolvent.

Mortgagee may pursue all his remedies concurrently.

If the mortgage debt be secured on real estate, and also *collaterally* by covenant or bond, the mortgagee may pursue all his remedies at the same time; but while the mortgagee may add to the principal moneys owing on his security all his costs charges and expenses (properly incurred), he cannot do that in his action of debt or of covenant (*e*). Every loan implies, of course, a debt,—and (where there is no *express* covenant to pay) a simple contract debt (*f*); and if the security ceases or is determined, while the loan (as to any part thereof) remains unpaid, the lender may still have his personal action of debt (or of covenant or assumpsit) for his mortgage debt: Therefore where there was a mortgage of leaseholds by sub-demise, and the lease (out of which the sub-demise was created) was forfeited by the lessor,—whereby the sub-demise also was compulsorily ended (*g*), and the security was therefore determined,—The mortgagee was held entitled to sue in debt for his loan (*h*): And, con-

(*a*) *Scobie* v. *Collins*, 1895, 1 Q. B. 375.
(*b*) *Brown* v. *Metropolitan Society*, 1 Ell. & Bl. 832.
(*c*) *Lloyd* v. *Davies*, 2 Exch. 183.
(*d*) *Spensley* v. *Harrison*, L. R. 15 Eq. 16.
(*e*) *Ex parte Fewings*, 25 Ch. Div. 338.
(*f*) *Jackson* v. *North Eastern R. C.*, 7 Ch. D. 739.
(*g*) *Smith* v. *Great Western R. C.*, 3 App. Ca. 165.
(*h*) *Burrell* v. *Smith*, L. R. 7 Eq. 399.

versely, although the personal right of action may have been barred by time, yet the security may itself remain and continue (*i*); but, of course, if the loan has been repaid, the security will be discharged also.

"Opening the foreclosure," —what it is, and when it happens.

If the mortgagee obtain full payment on the bond or covenant (or simple contract), the mortgagor is (by the fact of payment) entitled to a reconveyance of the estate, —and foreclosure is (in that case) rendered unnecessary. But if the mortgagee obtains only part payment on the bond or on the covenant (or on the simple contract debt), then he may institute (or go on with) his foreclosure action, and (giving credit in account for what he has received) foreclose for the remainder,—and, of course, he may (in such a case) *sell* also for the remainder of his debt.

If the mortgagee (not choosing to sell, but electing to foreclose) obtains a foreclosure first,—and then alleges, that the value of the estate is not sufficient to satisfy the mortgage debt,—He is not (in such a case) absolutely precluded from suing on the bond or covenant (or on the simple contract); but (by doing so) he gives to the mortgagor a renewed right to redeem the estate and to get it back,—Or, in other words, he thereby "*opens the foreclosure*" (*k*). If, therefore, the mortgagee (after foreclosure) commence an action against the mortgagor on the bond covenant or simple contract, the mortgagor may counterclaim against him for redemption,—So that, if the mortgagee has so dealt with the estate as to be unable to restore it to the mortgagor, the Court will (or, at least, may) stay the action (*l*). Also, generally, a foreclosure decree is almost always liable to be opened,—and a mortgagor may (for good cause shown) redeem even after foreclosure absolute (*m*): *Secus*, where there has been a sale (in lieu of a foreclosure (*n*)).

(*i*) *Hugill* v. *Wilkinson*, 38 Ch. D. 480.
(*k*) *Dyson* v. *Morris*, 1 Ha 413.
(*l*) *Palmer* v. *Hendrie*, 27 Beav. 349.
(*m*) *Campbell* v. *Holyland*, 7 Ch. Div. 166.
(*n*) *Lockhart* v. *Hardy*, 9 Beav. 349; *Tooke* v. *Hartley*, 2 Dick. 785.

Mortgagor's continuing liability on covenant;

The original mortgagor, having expressly covenanted to pay the debt, remains liable, of course, to the original mortgagee on that covenant, even after he has conveyed away his equity of redemption to a purchaser; and (in such a case) the purchaser is not *personally* liable to the mortgagee on the covenant,—although he may be (and usually is) liable to the mortgagor, on his (the purchaser's) own covenant with him, to pay the mortgage debt, and to indemnify the mortgagor from it (*o*): And

and his indemnity from purchaser, effectuated even as against subsequent mortgagee.

where there is such a covenant of indemnity, if the purchaser should (after his purchase) have made a second mortgage on the estate, and the first mortgagee afterwards sues the mortgagor,—The latter (on payment of the mortgage debt) will be entitled to a reconveyance of the mortgaged hereditaments,—and will in that way obtain (even as against the second mortgagee) a security on the mortgaged hereditaments in aid of the covenant of indemnity (*p*). Also, where a first mortgagee forecloses (although by consent), a second mortgagee is not prevented thereby from afterwards suing on the mortgagor's covenant to buy,—and if the mortgagor should meanwhile be dead, and his estate has been distributed, the second mortgagee may (where there is no equity against him) require the distributees to refund (*q*).

The equity of redemption follows the limitations of the original estate.

Regarding the proviso for redemption, where the mortgage is by husband and wife of the wife's estate,—It is a principle of equity, that although the equity of redemption should be reserved to the husband and his heirs,—or to the husband and wife and their heirs,—yet there shall be a *resulting* trust for the benefit of the wife and her heirs (*r*): But, of course, the wife may be estopped from claiming recoupment (*s*); and the intention to alter the previous title may appear on the language of the proviso itself, no express declaration to that effect being required (*t*). Also, there is, *semble*, no resulting equity to the wife, in the case of a mortgage of the wife's estate,

(*o*) *Waring* v. *Ward*, 7 Ves. 332; *Mills* v. *U. C. Bank*, 1911, 1 Ch. 669.
(*p*) *Kinnaird* v. *Trollope*, 39 Ch. Div. 636.
(*q*) *Worthington* v. *Abbott*, 1909, W. N. 238.
(*r*) *Huntingdon* v. *Huntingdon*, 2 Bro. P. C. 1; *Hall* v. *Hall*, 1911, 1 Ch. 487.
(*s*) *Clinton* v. *Hooper*, 1 Ves. 173.
(*t*) *Jones* v. *Davies*, 8 Ch. Div. 205.

where the mortgage is effected under the provisions of s. 39 of the Conveyancing Act, 1881 (*u*).

Wife's absolute release, &c.,—is only *quoad.*

Where the wife has a charge only on the land, and she (on a mortgage by the husband for a debt of the husband's) joins with her husband in releasing that charge,—although the release should be (in terms) absolute, yet it is not absolute,—but (in equity) is construed as being for the purposes only of the mortgage (*x*). Also, where the wife's property is a leasehold property, and she assigns it to her husband absolutely, and he *simultaneously* mortgages it,—In such a case, the wife's title to the property remains in her,—subject only to the mortgage (*y*).

Proviso for redemption to be strictly pursued.

But the terms of the proviso for reconveyance must (subject only to that equity) be literally complied with in every reconveyance by the mortgagee, the danger of reconveying in any other way being serious (*z*); and, of course, it is by the proviso for redemption (and by that alone), that we ascertain whether there has yet been default by the mortgagor (*a*).

(*u*) *Paget* v. *Paget*, 1898, 1 Ch. 470.
(*x*) *Lindo* v. *Lindo*, 1 Beav. 496.
(*y*) *Davis* v. *Whitehead*, 1894, 2 Ch. 133.
(*z*) *Magnus* v. *Queensland National Bank*, 37 Ch. Div. 466.
(*a*) *Williams* v. *Morgan*, 1906, 1 Ch. 804.

CHAPTER XVII.

OF EQUITABLE MORTGAGES OF REALTY BY DEPOSIT OF TITLE-DEEDS.

Deposit of title-deeds, *being an agreement executed*,—is a good equitable mortgage; and is not within the Statute of Frauds.

If the title-deeds of an estate are deposited by a debtor with his creditor (*a*), or with some third person on behalf of the creditor (*b*), such deposit (whether it be accompanied with any written memorandum or not), amounts to (and is) a valid mortgage of the estate: That is to say, the deposit is evidence of *an agreement* for a mortgage (*c*); and, the agreement being *executed* by the deposit (and being no longer *executory*), the creditor may sue thereon,—*Scil.*, for the completion of his security by a legal conveyance from the debtor (*d*).

The equitable mortgage,—good, only if an intention to mortgage.

But no such mortgage could, formerly, have been effected with the wife of the borrower (*e*),—although, *semble*, it may now be so effected (*f*); and, of course, the intention that the deposit shall operate as a mortgage, must always be present,—for if the deposit be wholly *alio intuitu*, it will not create any mortgage (*g*).

Deposit of receipt for purchase-money,—effect of.

There may be an equitable mortgage by deposit of the mere receipt for the purchase-money of an estate,—*Scil.*, where the estate has not yet been conveyed to the purchaser, and the receipt specifically refers to the estate (*h*); and on the subsequent completion of the sale, the mortgagee may have the conveyance executed to himself.

(*a*) *Russel* v. *Russel*, 1 Bro. C. C. 269.
(*b*) *Ex parte Coming*, 9 Ves. 115.
(*c*) *Ex parte Wright*, 19 Ves. 258.
(*d*) *Price* v. *Bury*, 2 Drew. 42.
(*e*) *Ex parte Coming. supra.*
(*f*) *In re Wallis*, 1902, 1 K. B. 719.
(*g*) *In re Beetham*, 18 Q. B. D. 766.
(*h*) *Goodwin* v. *Waghorn*, 4 L. J., N. S., Ch. 162.

Certificate, or office copy,—deposit of, in case of registered land.

When freehold land has been registered under the Land Transfer Acts, 1875, 1897, the land certificate is the proper document to deposit (*i*); and the office copy of a registered lease, and (for the purpose of any sub-mortgage) the certificate of charge, would (in like manner) be the proper document to deposit (*k*); and in the case of copyhold land, the copy of the Court roll would be deposited (*l*). But where the property is a church benefice,—and the incumbent is the registered proprietor of the benefice,—he is expressly disabled from effecting a mortgage by deposit (*m*),—either because a benefice is not, in general, a mortgageable property at all (*n*),—or for some other reason not exactly apparent (*o*).

Equitable mortgagee by deposit,—his remedy by foreclosure, or by sale.

A mortgagee by deposit is entitled to the remedy of foreclosure (*p*); but he is also entitled to an order for sale (*q*),—and that, whether there is or is not a written memorandum accompanying the deposit (*r*); and, usually, a sale (and not a foreclosure) is the preferable remedy (*s*): But an equitable mortgagee by deposit is not entitled (by virtue merely of his estate) to enter upon the lands,—nor (until there has been an order for sale) to sell them; nor is he entitled to receive the rents and profits,—although, if the tenant chooses to pay him the accruing rents, he (the tenant) cannot recover back the rents so paid (*t*).

Sale,—time for.

By the order for sale, the sale will, in general, be authorised one month after the certificate showing the amount of what is due (*u*); but a period of three months after certificate will occasionally be given. Also, after

(*i*) *Harrold* v. *Plenty*, 1901, 2 Ch. 314.
(*k*) *Ex parte Moss*, 3 De G. & Sm. 599; 60 & 61 Vict. c. 65, s. 8, sub-s. 6.
(*l*) *Ex parte Warner*, 19 Ves. 202.
(*m*) 60 & 61 Vict. c. 65, s. 15 (ii).
(*n*) *Supra*, pp. 235, 236.
(*o*) *Edwards-Moss* v. *Marjoribanks*, 7 H. L. Ca. 806.
(*p*) *Lees* v. *Fisher*, 22 Ch. D. 283.
(*q*) *York Union Banking Co.* v. *Artley*, 11 Ch. Div. 205.
(*r*) *Harrold* v. *Plenty*, *supra*.
(*s*) *Heath* v. *Crealock*, L. R. 10 Ch. App. 22.
(*t*) *Finch* v. *Tranter*, 1905, 1 K. B. 427.
(*u*) *Wade* v. *Wilson*, 22 Ch. Div. 235.

Possession, how obtained.

foreclosure absolute (whether in the case of a legal or in the case of an equitable mortgage), the mortgagee was not (formerly) entitled, *in the same action*, to recover the possession; but, *now*, under Order XVIII. Rule 2, in any action for foreclosure, the plaintiff may claim (and obtain) an order against the defendant for delivery of the possession (*x*).

Mortgage by deposit,—registration of; none in Middlesex.

As regards lands in Middlesex, an equitable mortgage by *mere* deposit need not be (and in fact cannot be) registered in the Middlesex Registry; but as regards lands in Yorkshire, a mortgage by *mere* deposit can be (and must be) registered in the proper Yorkshire Registry (*y*).

Deposit of deeds covers further advances;

A mortgage by deposit will cover future advances,—*Scil.*, if such was the agreement when the first advance was made, or if the subsequent advance was, in fact, made on an agreement (express or implied) that the deeds were to remain a security for it as well (*z*).

and carries interest, at 4 per cent., usually.

A mortgage by deposit carries interest at the rate of £4 per cent. (*a*),—failing any other agreed rate: And it is in fact, the settled rule of equity, to give interest at £4 per cent. on all *equitable* charges whatsoever, where the charge does not expressly provide a different rate, and although the charge should be altogether silent as to any interest whatever being payable (*b*).

Deposit of deeds for purpose of preparing a legal mortgage.

Where there has been a deposit of title-deeds for the purpose of preparing a legal mortgage, the balance of authority is in favour of the proposition, that such deposit, although for such specific purpose, constitutes (where the money has been actually advanced) a valid interim equitable mortgage,—that interim effect being not inconsistent with the expressed purpose of the deposit of the title-deeds (*c*),—*Secus*, if the money is not then

(*x*) *Thynne* v. *Sarl*, 1891, 2 Ch. 79.
(*y*) *Kettlewell* v. *Watson*, 26 Ch. D. 501.
(*z*) *James* v. *Rice*, 5 De G. M. & G. 461.
(*a*) *Re Kerr's Poliey*, L. R. 8 Eq. 331.
(*b*) *Savile* v. *Drax*, 1903, 1 Ch. 781.
(*c*) *Edge* v. *Worthington*, 1 Cox, 211.

actually advanced (*d*): But a mere verbal agreement to deposit the title-deeds does not (without an actual deposit) constitute a good equitable mortgage,—although such a mere agreement (if in writing) would be good without an actual deposit.

Parol agreement to deposit deeds, for money advanced.

In order to create an equitable mortgage by deposit, it is not necessary that *all* the title-deeds (or even all the *material* title-deeds) should be deposited,—it being sufficient, if the deeds deposited are material to the title, and are proved to have been deposited with the intention of thereby creating a mortgage (*e*); but there is, of course, great danger in leaving any of the title-deeds outstanding in the mortgagor (*f*). Also, an equitable mortgagee who parts with the title-deeds, and so enables the depositor to make another equitable mortgage, may be (and usually will be) postponed to such second equitable mortgagee,—*Scil.*, Because he has so acted, as to conduce to a fraud being committed (*g*). But in the case of a prior equitable mortgagee (equally as with a prior legal mortgagee), if it is sought to postpone him, some *positive* act on his part must be shown (*h*); and mere negligence will not do (*i*),—although long and inexcusable neglect may amount to a *positive* act within the meaning of the rule (*k*): And where A. B. had recently purchased certain lands in fee simple; and he deposited with U. all the title-deeds (except the purchase-deed), and afterwards deposited the purchase-deed with Z.,—The Court said, that U. had priority, and that Z. must displace that priority (if he could (*l*)).

All title-deeds need not be deposited.

Equitable mortgagee, parting with the title-deeds to mortgagor.

Also, an equitable mortgagee by deposit will, in the general case, be entitled to priority over a subsequent legal mortgagee who advances his money *with notice* (actual or

Equitable mortgagee has priority to subsequent

(*d*) *Norris* v. *Wilkinson*, 12 Ves. 192.
(*e*) *Lacon* v. *Allen*, 3 Drew, 579; *Roberts* v. *Crofl*, 2 De G. & J. 1.
(*f*) *Colyer* v. *Finch*, 5 H. L. Ca. 905.
(*g*) *Keate* v. *Phillips*, 18 Ch. Div. 560.
(*h*) *Adsetts* v. *Hives*, 33 Beav. 52.
(*i*) *Peat* v. *Clayton*, 1906, 1 Ch. 659.
(*k*) *Farrand* v. *Yorkshire Bank*, 40 Ch. Div. 182.
(*l*) *Roberts* v. *Croft*, 24 Beav. 223.

legal mortgagee with notice.

constructive) of the deposit: Also, any one who purchases from a mortgagee (selling under his power of sale), is deemed to have notice,—because he necessarily has notice,—of any "*sub-mortgage by deposit*" which the selling mortgagee may have made. But mere incaution on the part of the subsequent *legal* mortgagee (or purchaser) will not postpone *him* to the prior equitable mortgage of which he has, in fact, no notice,—Because a legal mortgagee or purchaser is not to be postponed, unless the so-called want of caution on his part amounts to fraud,—or to gross negligence evidencing fraud (*m*). But the Court will not impute any such gross negligence to the mortgagee, if he has *bonâ fide* inquired for the deeds, and a reasonable excuse has been given for the non-delivery of them (*n*),—but only if he makes no inquiry at all, or makes a mere vague (and purposeless) inquiry, which is, in fact, no inquiry (*o*).

Legal mortgagee not postponed to prior equitable mortgagee, if former has made *bonâ fide* inquiry for the deeds.

Where a man's solicitor (being fraudulently disposed) sent the mortgagee a parcel of deeds, and represented that the parcel contained *the deeds*, when it contained, in fact, only *some* of the deeds,—That mortgagee was not postponed to a subsequent equitable mortgagee by deposit of the other deeds (*p*). Also, where a prior legal mortgagee left all the title-deeds with his mortgagor,—Whereby the mortgagor was left in a position to mortgage again (and, being fraudulently disposed, he did mortgage again) by purported first legal mortgage in fee simple,—The first legal mortgagee was not only postponed to that purported first legal mortgagee, but was postponed also to a further subsequent equitable mortgagee who had *in consequence* relied on the purported first mortgagee as being the only first mortgagee (*q*).

Equity against equity,—where the trustee is in

Where the contest is between two equities simply, the first in time will (ordinarily) prevail,—and especially so, where the legal estate is holden by a trustee for the equity

(*m*) *Oliver* v. *Hinton*, 1899, 2 Ch. 264.
(*n*) *Hewitt* v. *Loosemore*, 9 Hare, 458.
(*o*) *Oliver* v. *Hinton*, *supra*.
(*p*) *Hunt* v. *Elmers*, 2 De G. F. & J. 578.
(*q*) *Clarke* v. *Palmer*, 21 Ch. Div. 124.

which is first in date (*r*),—assuming always, of course, that there has been no *positive* act on the part of the person entitled to the first equity to mislead the person entitled to the second equity, and assuming also that the trustee on his part has not neglected his duty to get into his own possession in the first instance *all* the deeds relative to the constitution of his full legal title as trustee (*s*). But where a first mortgagee, without any fraudulent intention, purposely left the title-deeds with the mortgagor, in order that he (the mortgagor) might make one specified mortgage only, or two mortgages of a specified aggregate amount only,—and the mortgagor, in excess of his authority, made several mortgages (instead of only one mortgage (*t*)), or grossly exceeded the specified aggregate amount (*u*),—The Court postponed the first mortgagee,—*Scil.*, because he had made the mortgagor his agent to borrow, and was left to his remedy against the agent.

default (as to possession of the title-deeds),—effect.

First mortgagee's agent to mortgage,—exceeding the limits of his agency,—effect on first mortgagee's security.

(*r*) *Burgis* v. *Constantine*, 1909, 2 K. B. 484.
(*s*) *Walker* v. *Linom*, 1907, 2 Ch. 104.
(*t*) *Perry-Herrick* v. *Attwood*, 25 Beav. 205.
(*u*) *Brocklesby* v. *Temperance Society*, 1895, A. C. 173.

CHAPTER XVIII.

OF PLEDGES AND MORTGAGES OF CHATTELS.

Sect. I. *Pledges and Mortgages, generally.*
Sect. II. *Bills of Sale of Chattels, generally.*
Sect. III. *Mortgages of British Vessels.*

Differences between a *mortgage* and a *pledge* of chattels:

A MORTGAGE of personal chattels is a transfer (subject to redemption) of the ownership of the chattels, the *possession* remaining with the mortgagor; but a pledge of personal chattels passes the immediate *possession* to the pledgee, together with only a special property in the chattels,—or with only a special ownership of them.

Sect. I. *Pledges and Mortgages, generally.*

(a) In their own nature.

In the case of a pledge, although a time for the redemption be fixed by the contract, yet the pledgor may redeem afterwards,—*Scil.*, within a reasonable time; and if no time is fixed for the redemption, the pledgor (unless he is sooner called upon by the pledgee) has his whole life to redeem,—and his personal representatives, in case of his death, may redeem (*a*); and his assignee may also redeem (*b*),—while and so long as the pledge still remains unsold by the pledgee.

(b) As regards remedies: (aa) Pledgors and pledgees

The remedy of the pledgor is, in the general case, at law; and it is only when any special reason exists for his so doing, that he comes into equity (*c*). Also, after a valid tender of the amount due, the pledgor may have detinue, —differently from a mortgagor, who can only (in such a case) redeem (*d*), the tender staying, in his case, the

(*a*) *Kemp* v. *Westbrook*, 1 Ves. Sr. 278.
(*b*) *Franklin* v. *Neate*, 13 Mee. & W. 481.
(*c*) *N. S. W. Bank* v. *O'Connor*, 14 App. Ca. 273.
(*d*) *Rourke* v. *Robinson*, 1911, W. N. 35.

further running of the interest, and entitling him to have a re-conveyance (*d*).

As regards the pledgee, although he may (in a proper case) take proceedings in equity to sell the pledge (*e*), still he may (after the time for redemption has passed, and upon due notice given to the pledgor) sell the pledge without any necessity for first obtaining an order for sale (*f*); but the pledgee ought not to sell, *without first demanding repayment of the money lent* (*g*).

Where A. has obtained a judgment against B., and B.'s furniture is taken in execution on the judgment,—and (under the sale by the sheriff) is assigned to A.; and B.'s friends buy it back from A., and leave it in (or restore it to) the possession of B.,—If B. should afterwards continue in possession of the furniture for six years or more, and then die, his possession of the furniture has not been adverse; and the friends who purchased from A. (and not the executors of B.) will continue entitled to it (*h*).

(bb) Mortgagors and mortgagees.

In the case of a mortgage (as distinguished from a pledge) of personal chattels (equally as in the case of a mortgage of land), there exists *after default,—i.e.*, after the *legal* right of redemption is lost,—an equity of redemption, which may be asserted by the mortgagor, if he brings his action to redeem within a reasonable time (*i*). And, as regards the mortgagee, there is not (in the case of mortgages of personalty) any necessity, in general, to bring an action of foreclosure or for a sale,—the mortgagee being entitled (on due notice) to sell the property (*k*); and the notice may (in a proper case) be given by advertisement. But when there are exceptional circumstances,—as when (*e.g.*) the equitable mortgage is of shares, and the debt itself is barred by lapse of time,—

(*d*) *Rourke* v. *Robinson*, 1911, W. N. 35.
(*e*) *Carter* v. *Wake*, 4 Ch. Div. 605.
(*f*) *Jones* v. *Marshall*, 24 Q. B. D. 269.
(*g*) *France* v. *Clark*, 26 Ch. Div. 257.
(*h*) *Edwards* v. *Clay*, 28 Beav. 145.
(*i*) *Kemp* v. *Westbrook*, 1 Ves. Sr. 278.
(*k*) *Deverges* v. *Sandeman*, 1902, 1 Ch. 579.

The mortgagee is justified (in such a case) in coming into equity, for an order to enforce his security by foreclosure or sale (*l*): Also, there is, apparently, no statute of limitations applicable to the action (*m*).

Reversionary personal estate, successively mortgaged,—application of, when the reversion falls in, before the first mortgagee has sold.

Where the personal property comprised in the mortgage is a reversion, and the reversion falls into possession before the mortgagee has actually exercised his power of sale,—The trustees are not bound to,—nor ought they to,—pay over the *entire* reversion to the mortgagee (when it is, and usually it is, in excess of the amount due on the mortgage); but the proper course is, for the trustees to pay to the mortgagee the amount only of his mortgage debt, retaining (and eventually paying over to the mortgagor,—or to and among the subsequent mortgagees (if any)),—the surplus (*n*).

Effect of transferring a pledge.

If the pledgee should, *before condition broken,* deliver over the pledge to a purchaser or to a sub-pledgee,—In such a case, if the pledge is of a negotiable instrument, the pledgor will be bound (*o*); but if the pledge is of a non-negotiable instrument, the pledgor will only be bound *to the extent of the pledgee's own right,*—Wherefore, in such latter case, if the purchaser or sub-pledgee (upon tender to him of the amount due to the original pledgee) should refuse to deliver up the pledge to the pledgor, the pledgor may have detinue against the purchaser or sub-pledgee (*p*).

Pledgee, where tricked out of his possession,—effect, where a subsequent adverse pledge.

Where the pledgee is tricked out of his possession of the pledge, and the pledgor thereafter pledges it to X., the title of X. (assuming that he is a *bonâ fide* pledgee) will be good; and (subject to X.'s title) the title of the former pledgee will remain good (or be set up again), as against the pledgor (*q*),—*Scil.*, because the first

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(*l*) *London and Midland Bank* v. *Mitchell*, 1899, 2 Ch. 161.
(*m*) *Mellersh* v. *Brown*, 45 Ch. D. 225.
(*n*) *Hockey* v. *Western*, 1898, 1 Ch. 350.
(*o*) *London Joint Stock Bank* v. *Simmons*, 1892, A. C. 201.
(*p*) *Nyberg* v. *Handelaar*, 1892, 2 Q. B. 202.
(*q*) *Babcock* v. *Lawson*, 5 Q. B. D. 284.

pledgee's possession is only momentarily divested by the trick (*r*).

Pledgee,—having notice of an act of bankruptcy by pledgor,—effect, as regards re-delivery of pledge.

Where a pledgee of securities (*e.g.* a bank) has notice of an act of bankruptcy, *committed by the pledgor since making the pledge*, and a tender of the amount due on the pledge is made to the pledgee after he has had such notice, —The pledgee is in a very awkward fix,—not knowing whether to deliver up the pledge or not; and, apparently, he is entitled to insist upon getting a valid receipt for the securities which he delivers up,—which receipt the pledgor cannot give (*s*).

The pledge will cover future advances in general.

As regards further advances, the presumption (as against the pledgor) is, that if the pledgee advance any further sum of money to the pledgor, the pledge is to be held until the subsequent advance (as well as the original debt) is paid (*t*). Also, it occasionally happens, under (*e.g.*) the "*mutual credit*" or "*mutual dealings*" clause, applicable in the case of the mortgagor's bankruptcy (*u*), that the mortgagee has the right to apply the surplus (after discharging his mortgage debt) in or towards satisfaction of a subsequent judgment debt (*x*),—or even of a subsequent simple contract debt (*y*),—this right not being a right of *tacking* (*z*),—but of retention simply.

Application of surplus,—so as to (in effect) *tack* another debt.

Factors and trade-vendees, —sales and pledges by.

By the provisions of the Factors Act, 1889 (52 & 53 Vict. c. 45),—as aided by s. 25 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71),—persons who are intrusted with the possession of goods as *factors for sale* may (although they are *not the owners* of such goods) validly pledge them to *bonâ fide* lenders; and *buyers* (with a view to sale in the ordinary course of trade) may also validly pledge such goods,—although the original sellers

(*r*) *Mocatta* v. *Bell*, 24 Beav. 585.
(*s*) *Ponsford* v. *Union Bank*, 1906, 2 Ch. 444, followed in *McCarthy* v. *Capital and Counties Bank*, 1911, W. N. 177.
(*t*) *De Mainbray* v. *Metcalfe*, 2 Vern. 691.
(*u*) *In re Mid-Kent Fruit Factory*, 1896, 1 Ch. 567.
(*x*) *Spalding* v. *Thompson*, 26 Beav 637.
(*y*) *In re Haselfoot*, L. R. 13 Eq. 327.
(*z*) *Christison* v. *Bolam*, 36 Ch. Div. 223.

should be unpaid. But these provisions do not apply to the case of any mere private individual (miscalled a purchaser) buying any specific article for his own use under a hire and purchase agreement (*a*),—*Scil.*, Because the Acts referred to have relation to dealings *in the course of trade only*,—that is to say, have relation only to persons who would (or might), ordinarily, employ "*mercantile agents*": And also because, in a hire and purchase agreement, there is really no real purchase, where the so-called purchaser has the option (and he, usually, has the option) of continuing the payment of his instalments (and so keeping the article), or of discontinuing the payment of his instalments (and in that case returning the article (*b*)).

Stoppage *in transitu*,—where a mortgage meanwhile created.

Where goods are shipped by a vendor, and afterwards the vendor (on account of the bankruptcy of the purchaser) exercises his right of stoppage *in transitu*; but a mortgage or pledge of the goods has, in the meantime, been created,—by indorsement of the Bills of Lading by way of security for an advance to some *bonâ fide* mortgagee or pledgee,—In such a case, the mortgage or pledge will be good; and (subject thereto) the title of the unpaid vendor will remain good (*c*): And the law would be the same, in the case of an interim *bonâ fide* sub-sale (*d*), or other *bonâ fide* sub-contract (*e*),—*Scil.*, in the case of specific goods; but not also,—or, at least, not invariably so,—in the case of goods sold in bulk, and for successive partial deliveries against successive corresponding payments (*f*).

Fraudulent purchase of goods.—disaffirmance of, by unpaid vendor,—legal position, where goods meanwhile pledged.

On a sale of specific goods to a fraudulent purchaser, the property in the goods passes into the purchaser even before delivery; and if the goods have been delivered also, the vendor has no lien thereon for his unpaid purchase-money: But if the unpaid vendor, on discovery of the fraud, disaffirms the contract,—and can re-possess him-

(*a*) *Helby* v. *Matthews*, 1895, A. C. 471.
(*b*) *Lee* v. *Butler*, 1893, 2 Q. B. 318.
(*c*) *In re Westzinthus*, 6 B. & Ad. 817.
(*d*) *In re Knight*, 13 Ch. D 628.
(*e*) *Bellamy* v. *Davey*, 1891, 3 Ch. 540.
(*f*) *Mordaunt Brothers* v. *British Oil Co.*, 1910, 2 K. B. 502; and see s. 47 of Sale of Goods Act, 1893.

self of the goods (as where they have been pledged by the fraudulent purchaser, and the vendor redeems the pledge),—Then, and in such a case (and even if the purchaser has meanwhile gone bankrupt), the property in the goods re-vests in the vendor; but if the price for the goods has been partly paid by the purchaser, the vendor must, of course, return the part-payment or part-payments to the purchaser (or to his bankruptcy trustee), excepting that he may set-off against that part-payment (or against those part-payments), the amount paid to redeem the pledge (*g*).

Sect. II. *Bills of Sale of Chattels, generally.*

Mortgages of personal chattels,—being bills of sale within the Bills of Sale Acts, 1878 and 1882.

Special statutory provisions,—for the protection as well of the creditors of the grantor as also (since 1882) of the grantor himself,—have been made (by the Bills of Sale Acts) regarding mortgages of personal chattels, where they are Bills of Sale,—the Bills of Sale Acts at present in force being the Acts of 1878 (*h*) and 1882 (*i*), and the first of the two Acts (which is the principal Act) extending not only to bills of sale given by way of mortgage, but also to bills of sale absolute (*k*),—while the second Act extends exclusively to bills of sale given by way of mortgage (*l*).

But it is to be remembered, that neither Act extends to transfers in the ordinary course of business among merchants (*m*),—nor to the debentures of a company (*n*), which keeps its own register of mortgages (*o*), every mortgage by such a company now requiring only to be filed with the registrar of companies within twenty-one days from its date (*p*), and the time for registration being extendible (*q*).

(*g*) *Tilley* v. *Bowman, Ltd.*, 1910, 1 K. B. 745, following *In re Eastgate*, 1905, 1 K. B. 465.
(*h*) 41 & 42 Vict. c. 31.
(*i*) 45 & 46 Vict. c. 43.
(*k*) *Ashton* v. *Blackshaw*, L. R. 9 Eq. 510.
(*l*) *Swift* v. *Pannell*, 24 Ch. Div. 210.
(*m*) *Young* v. *Curtis*, 1905, 2 K. B. 381, 772.
(*n*) *In re Standard Manufacturing Co.*, 1891, 1 Ch. 627.
(*o*) 8 Edw. VII. c. 69, s. 100.
(*p*) 8 Edw. VII. c. 69, s. 93.
(*q*) *In re Spiral Globe Co.*, 1902, 2 Ch. 209.

Requisite of registration.

Under the provisions of the Bills of Sale Acts, the bill of sale (whether it be a security for money lent or not) must be registered within seven days of its execution,—and (with it) an affidavit (not to be sworn before the solicitor of the grantee (*r*)),—stating the execution of, and the true date of, the bill, the residence and occupation of the grantor, and also the residences and occupations of the attesting witnesses; and the execution of it by the grantor must be attested by a solicitor,—*Scil.*, when the bill is by way of absolute gift or assignment (but not when it is by way of security); and the bill must be re-registered every five years.

Schedule,—when required and when not.

Also, if the bill of sale is given by way of security, it must contain a *schedule* specifically enumerating the personal chattels comprised therein; and (in this case) the grantor must not convey as "*beneficial owner*" (*s*),—nor may the document extend to include after-acquired chattels (*t*),—save chattels in substitution (*u*): And the bill must also otherwise be in rigorous accordance with the form prescribed by the Act of 1882 (*x*); and, in particular, the consideration for which the bill is given must be truly stated therein, however difficult to state that consideration it may be (*y*). But the repayment of the loan (principal and interest) may be lawfully provided for by instalments (*z*).

Non-compliance with prescribed form, effect of.

Failing compliance with the above specified requisites, or with any of them, the bill of sale will be void,—As against (1) other duly registered bills of sale; (2) the trustee in bankruptcy of the grantor; and (3) the execution-creditors of the grantor,—and where it is by way of security it will (for such non-compliance) be void even as between the grantor and the grantee themselves (*a*),—and as regards even the covenant for the repayment of the

(*r*) *Baker* v. *Ambrose*, 1896, 2 Q. B. 372.
(*s*) *In re Barber*, 17 Q. B. D. 259.
(*t*) *Thomas* v. *Kelly*, 13 App. Ca 506.
(*u*) *Seed* v. *Bradley*, 1894, 1 Q. B. 319.
(*x*) *Simmons* v. *Woodward*, 1892, A. C. 100.
(*y*) *Darlow* v. *Bland*, 1897, 1 Q. B. 125.
(*z*) *Rosefield* v. *Provincial Union Bank*, 1910, 2 K. B. 781.
(*a*) *In re Burdett*, 20 Q. B. D. 310.

money lent (*b*). However, any collateral security (which was otherwise good in itself) would not also be void (*c*),—nor any assurance of freehold lands (*d*),—nor any other distinctly severable operative part of the bill (*e*).

Bills of Sale,—what are, and what are not.

By the interpretation clause contained in the Act of 1878, Bills of Sale extend to include (besides assignments properly so called) licences to take possession of personal chattels (*f*): But a document, if it is to be a bill of sale, must be an "*assurance*" of some sort (*g*),—so that a mere receipt for the price of goods sold would not be a bill of sale of the goods referred to therein (*h*): Also, the Act of 1882 expressly provides that the possession of the chattels (*Scil.*, for the purpose of realising the security (*i*)) shall not be taken by the grantee,—unless for one or other of the defaults specified in s. 7 of that Act; nor are the personal chattels to be thereafter removed or sold until five clear days have expired,—the power of sale here referred to being the common law power of sale,—and not the power of sale given to mortgagees by the Conveyancing Act, 1881 (*k*). Moreover, the bill of sale (even when completely valid) is no protection of the goods comprised therein against the landlord's right of distress for rent in arrear,—nor against certain other distresses,—for example, the summary distress for poor-rates (*l*):

Realisation of security.

Also, as regards the trade goods of the grantor comprised in the bill of sale, the security given by the bill of sale, although a perfectly valid bill of sale and duly registered, is not a protection against the trustee in bankruptcy of the grantor, while and so long as the possession

(*b*) *Davies* v. *Rees*, 17 Q. B. D. 408; *Smith* v. *Whiteman*, 1909, 2 K. B. 437.
(*c*) *Monetary Advance Co.* v. *Cater*, 20 Q. B. D. 785.
(*d*) *Brooke* v. *Brooke*, 1894, 2 Ch. 600.
(*e*) *In re Isaacson*, 1895, 1 Q. B. 333.
(*f*) *Lord's Trustee's case*, 1909, A. C. 109.
(*g*) *Newlove* v. *Shrewsbury*. 21 Q. B. D. 41.
(*h*) *Charlesworth* v. *Mills*, 1892, A. C. 231.
(*i*) *Ex parte Wickens*, 1898. 1 Q. B. 543.
(*k*) *Calvert* v. *Thomas*, 19 Q. B. D. 204.
(*l*) *In re Marriage Neave & Co.*, 1896, 2 Ch. 693.

also of these goods has not been taken by the grantee (*m*), —which it can hardly ever be.

Possession taken at once, dispenses with registration.

Generally, where the bill of sale is of such a character, that possession can be (and actually is) taken thereunder, immediately on the execution thereof,—*and is retained thereafter*,—no registration of the bill is required at all (*n*): But the registration might sometimes,—for example, in the case of a *post-nuptial* marriage settlement,—be desirable (although unnecessary),—*Scil.*, because, under s. 20 of the principal Act (*the registration being once duly made and afterwards duly maintained*), the personal chattels comprised in such a settlement are not in the "*order and disposition*" of the grantor within the meaning of the Bankruptcy Act, 1883,—always assuming that these personal chattels are not trade-goods.

What documents require no registration,—as not being bills of sale.

Also, no registration is required of a wharfinger's warrant deposited by way of pledge, or of a delivery order for goods at a warehouse.

And, as regards hiring agreements, firstly, if they are *bonâ fide*, they are not bills of sale at all (*o*); but, secondly, if they are only colourably hiring agreements, they must be registered (*p*): That is to say:—Firstly, if there is first a real and genuine *bonâ fide* sale, and then the purchaser lets the goods on hire, the letting is good without registration (*q*); but, Secondly, if the purported prior sale is not a real sale,—or the subsequent purported letting on hire is in and by (or is evidenced by) the document itself by which the prior purported sale purports to be effected,—in that case, the letting is not good without re-registration (*r*).

As regards building agreements, where there is (and usually there is) a clause inserted in the agreement, where-

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(*m*) *In re Ginger*, 1897, 2 Q. B. 461.
(*n*) *Hopkins* v. *Gudgeon*, 1906, 1 K. B. 690.
(*o*) *Crawcour* v. *Salter*, 18 Ch. Div. 30.
(*p*) *Mellor's Trustee* v. *Maas*, 1905, A. C. 102.
(*q*) *Yorkshire Rail. Wagons* v. *Maclure*, 21 Ch. D. 309.
(*r*) *Beckett* v. *Tower Assets Co.*, 1891, 1 Q. B. 638.

by the building materials become the property of the building owner, upon the building contractor's failure to complete the contract,—That clause (or the agreement containing it) is not, in general, a bill of sale of the materials, so as to require registration (*s*),—not even where (upon the words of the clause) the materials are made to vest in the building owner immediately they are brought on the ground (*t*). But the materials, so far as remaining unbuilt in, would be (or might be) within the order and disposition clause (s. 44) of the Bankruptcy Act, 1883 (*u*).

Sect. III. *Mortgages of British Vessels.*

Mortgages of ships.

These mortgages are to be in the form prescribed in the Merchant Shipping Act, 1894 (*x*), s. 31,—and are to be registered by the Registrar of Shipping; and such registration supersedes the necessity of any other registration. Also, successive registered mortgages rank (as between themselves) according to the dates of their respective registrations,—and are not affected by the "*order and disposition*" clause of the Bankruptcy Act, 1883, s. 44.

These mortgages are also transferred in the prescribed manner—and are discharged (and the registration thereof vacated (*y*)) in the prescribed manner; and where the mortgagee's interest is transmitted by death, marriage, or the like, a declaration of such transmission (signed by the transmittee) is to be registered.

Powers of registered mortgagee.

The registered mortgagee has an absolute power of sale; and he may also (at any time *after default*) take possession of, and also use (*z*), the ship: But until the mortgagee takes possession, the mortgagor remains the owner (*a*),—and may therefore use the ship,—not impairing (or un-

(*s*) *Hart's case*, 1903, 1 Ch. 690.
(*t*) *Reeves* v. *Barlow*, 12 Q. B. D. 436.
(*u*) *In re Weibking*, 1902, 1 K. B. 713.
(*x*) 57 & 58 Vict. c. 60.
(*y*) *Brond* v. *Broomhall*, 1906, 1 K. B. 571.
(*z*) *De Mattos* v. *Gibson*, 1 Jo. & H. 79.
(*a*) *The Heather Bell*, 1901, P. 272.

duly endangering) the security (*b*),—and will be entitled also to the freight, which may be earned before possession taken by the mortgagee (*c*), although not to the subsequently earned freight: But the costs of all necessary repairs (for which, *when executed abroad*, the vessel is subject to a lien) take precedence of the mortgage (*d*).

Unregistered mortgages,—validity of.

Unregistered equities,—enforcement of.

The mortgage of a ship, although it should be unregistered, will be good as between the mortgagor and the mortgagee; and, by s. 57 of the Act of 1894, re-enacting (in this particular) the like provision contained in the Merchant Shipping Act, 1862 (*e*), and displacing the old law to the contrary (*f*),—equities (if there are any) may be enforced against the mortgagees (and the owners) of ships,—just as against the mortgagees (and the owners) of other personal chattels (*g*).

(*b*) *Law Guarantee* v. *Russian Bank*, 1905, 1 K. B. 815.
(*c*) *Shillito* v. *Biggart*, 1903, 1 K. B. 683.
(*d*) *The Orchis*, 15 P. D. 38.
(*e*) 25 & 26 Vict. c. 63.
(*f*) *Liverpool Bank* v. *Turner*, 2 De G. F. & J. 502.
(*g*) *Ward* v. *Beck*, 13 C. B. N. S. 668; *The Venture*, 1908, P. 218.

CHAPTER XIX.

OF LIENS.

Varieties of lien,—at law and in equity.

THERE are liens at law, and liens in equity; and among the many liens at law, may be instanced the lien which exists (by the common law) in favour of artisans (*a*), manufacturers (*b*), and the like; and the lien which exists (by custom) in favour of innkeepers (*c*), packers (*d*), warehousemen (*e*), auctioneers (*f*), and the like; and the lien which exists (by usage) in favour of stockbrokers (*g*), and bankers (*h*); and the lien which exists (by statute) against a ship (and against the true owners and mortgagees thereof), in respect of the expenses incurred for the ship's necessaries (*i*), and the like. And among the divers liens in equity,—and which are liens in equity only (*k*),—the two principal ones are the vendor's lien for his purchase-money, and the vendee's lien for his deposit.

There may also be concurrent liens, the one of them being *paramount* to the other, but each being consistent with the other (*l*). Also, there may be a *particular* lien on goods (which is confined to the particular charge), and a *general* lien on goods (which extends to the general balance due): And there may be also a lien on *lands*,—and the lien on lands differs from a lien on *goods* in

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(*a*) *Keene* v. *Thomas*, 1905, 1 K. B. 136.
(*b*) *Bellamy* v. *Davey*, 1891, 3 Ch. 540.
(*c*) *Robins* v. *Gray*, 1895, 2 Q. B. 501.
(*d*) *In re Witt*, 2 Ch. Div. 489.
(*e*) *Ex parte Deeze*, 1 Atk. 228.
(*f*) *Webb* v. *Smith*, 38 Ch. Div. 192.
(*g*) *London and Globe case*, 1902, 2 Ch. 416.
(*h*) *Brandao* v. *Barnett*, 12 Cl. & F. 787.
(*i*) *The Ripon City*, 1897, P. 226.
(*k*) *Lord's Trustee's case*, 1908, 2 K. B. 54.
(*l*) *The Emilie Millon*, 1905, 2 K. B. 817.

this material particular, namely, that the lien on lands commences only when the possession of the lands is parted with to the purchaser, whereas the lien on *goods* lasts only while the possession is retained (*m*).

And, lastly, there is the lien of a solicitor on the *deeds and documents* of his client (which arises *proprio vigore*, but which at the most gives only a sort of *passive* redress); and the lien of a solicitor on a *fund recovered* (which arises, in general, only upon the Court's declaring the solicitor entitled to it, but which once it has arisen is an *active* remedy and redress); and it is these two liens which are now to be dealt with.

The lien of a solicitor: (1) On deeds, books, &c.

Firstly, *The Lien of a Solicitor on the Deeds, Books, and Papers of his Client.*—This is a lien originating by custom, and afterwards sanctioned by the decisions of the Courts (both of law and of equity); and it depends not upon contract,—being merely an equitable right to negatively *withhold* from the client (until the bill of costs is paid) such things as have been intrusted to the solicitor as such, and on which he has bestowed his skill and labour. But, in order that this lien may arise, the deeds must have come into the solicitor's hands, *in his character of solicitor, and not otherwise* (*n*); and his lien on them is for his costs only, and not for any debts (*o*).

(2) On fund realised in suit.

Secondly, *The Solicitor's Lien upon a Fund.*—This is a lien which existed (and exists) by the common law (*p*), but which has been recognised and enlarged (*q*) by the Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28: By which Act, it has been enacted, that it shall be lawful for the judge (*r*),—whether or not the judge before whom the suit or matter has been heard (*s*),—to declare (in his own discretion (*t*)), that the solicitor is entitled to a charge upon the property recovered or preserved in such suit or matter by his instrumentality. And the exe-

(2a) On costs recovered.

(*m*) *Grice* v. *Richardson*, 3 App. Ca. 319.
(*n*) *Ex parte Fuller*, 16 Ch. D. 617.
(*o*) *In re Galland*, 31 Ch. Div. 296.
(*p*) *Haymes* v. *Cooper*, 33 Beav. 431.
(*q*) *Curnock* v. *Born*, 1900, 2 Ch. 433.
(*r*) *In re Graydon*, 1896, 1 Q. B. 417.
(*s*) *In re Deakin*, 1900, 2 Q. B. 489.
(*t*) *Harrison* v. *Harrison*, 13 P. D. 180.

cutor (*u*), or assignee (*x*), of the solicitor may also be declared entitled to this lien: And even where the solicitor has been discharged by the client, he will be (or may be) entitled to the lien (*y*),—but subject to the like lien in the new solicitor,—the lien of the later solicitor always having precedence (*z*). Also, the Court will, occasionally, declare this sort of lien, where it is the only available remedy,—as, for example, where the property recovered (being a legal remainder) cannot be otherwise got at by any execution (whether legal or equitable (*a*)), the lien arising by such declaration of the judge being always declared to be subject to (*e.g.*) the prior right (or equity) of the executor-trustee to his costs (*b*), or to other (if any) the prior subsisting equity (*c*).

The word "*property*" in the statute includes "*costs* ordered to be paid"; but where there is a counter-claim in the action, and the plaintiff succeeds on the claim and the defendant on the counter-claim, the *balance* only of such costs is deemed to have been "recovered" in the action (*d*).

The Court will not declare the solicitor entitled to this lien, where he has taken a specific mortgage for his costs of the suit or matter (*e*); but the solicitor may be entitled (at one and the same time) both to his lien on the papers of his client and to his lien on the fund recovered (*f*). But he is not entitled to *two* charging orders in respect of the same costs (*g*).

Lien on fund, extent of.

The mere fact of the client being an infant will not prevent the lien from arising (*h*); and, in fact, the lien extends (usually) to the entire fund, and not merely to

(*u*) *Baile* v. *Baile*, L. R. 13 Eq. 497.
(*x*) *Briscoe* v. *Briscoe*, 1892, 3 Ch. 543.
(*y*) *Rhodes* v. *Sugden*, 34 Ch. D. 155.
(*z*) *Knight* v. *Gardner*, 1892, 2 Ch. 368.
(*a*) *Woods* v. *Harrison*, 1898, 1 Ch. 465.
(*b*) *In re Turner*, 1907, 2 Ch. 126, 539.
(*c*) *The Paris*, 1896, P. 77.
(*d*) *Westacott* v. *Bevan*, 1891, 1 Q. B. 774.
(*e*) *In re Taylor Stileman & Co.*, 1891, 1 Ch. 590.
(*f*) *Pilcher* v. *Arden*, 7 Ch. Div. 318.
(*g*) *In re Cockerell's Estate*, 1911, 2 Ch. 318.
(*h*) *Wright* v. *Sanderson*, 1901, 1 Ch. 319.

the share of the solicitor's own particular client therein (*i*), —excepting that, where the lien purports to be a mere recognition of the lien which already exists by the common law, then it will (usually) be limited to the share of the particular client in the fund (*k*).

Derivative lien of town agent.

The town agent of a country solicitor has a lien against the country solicitor (*l*),—who in his turn has a lien against the country client,—upon the fund recovered; and the town agent may exercise against the country client, —*to the extent of the country solicitor's lien against such client, but not further* (*m*),—his (the town agent's) own lien against the fund; but (save in that indirect way) the town agent of the solicitor is not entitled to any lien upon the fund (*n*). And here it should be mentioned, that the general lien of the town agent against the country solicitor extends to all costs whatsoever that are coming to the country solicitor,—and covers, in fact, everything that is due from the country solicitor to the town agent (*o*), —*Scil.*, on the agency account between them (*p*).

The lien arising by declaration is only for the costs of litigation properly so called,—and for the costs only of the particular litigation (*q*),—and therefore extends not to (*e.g.*) the costs of an arbitration, or to *costs incurred altogether out of Court* (although these latter may have been the means of forestalling any proceedings in Court (*r*)).

There is no statute of limitations applicable against the solicitor's lien,—whether the lien be on papers (*s*) or on a fund recovered (*t*): But, *semble*, the Court might, on the ground of delay, refuse to declare the charge (*u*);

(*i*) *Scholey* v. *Peck*, 1893, 1 Ch. 709.
(*k*) *Curnock* v. *Born*, 1900, 2 Ch. 433.
(*l*) *Farewell* v. *Coker*, 2 P. Wms. 459.
(*m*) *Ex parte Edwards*, 8 Q. B. D. 262.
(*n*) *Macfarlane* v. *Lister*, 37 Ch. Div. 388.
(*o*) *In re Jones and Roberts*, 1905, 2 Ch. 219.
(*p*) *Lawrence* v. *Fletcher*, 12 Ch. D. 858.
(*q*) *Smith* v. *Betty*, 1903, 2 K. B. 317.
(*r*) *In re Lloyd-George*, 1898, 1 Q. B. 520.
(*s*) *Curwen* v. *Milburn*, 42 Ch. D. 424.
(*t*) *Higgins* v. *Scott*, 2 B. & Ad. 415.
(*u*) *Curnock* v. *Born*, 1900, 2 Ch. 433.

and in every taxation,—even under the common order to tax (*x*),—the client may, *now*, freely allege the bar of time,—*Scil.*, save as against the lien.

Lien on papers, only commensurate with client's right, at the time of the deposit.

The solicitor's lien on documents being only as between himself and his client, the solicitor cannot refuse to produce the documents, on the lawful demand of a third party,—*Scil.*, in a case where the client himself would be bound to produce them (*y*),—as (*e.g.*) in an administration action (*z*). Also, where a solicitor expressly discharges himself (*a*), or impliedly discharges himself (*b*), from the further conduct of the action, he is required to give up all the papers in the action to the new solicitor,—but always without prejudice to the lien (*c*).

Set-off, or other equity, intervening,—effect of.

The solicitor's lien on papers will not prejudice any prior existing equity (*d*),—or be prejudiced by an equity arising subsequently (*e*). But, the solicitor's lien on a sum due or payable to his client having formerly prevented a set-off of such sum against a sum due from the client (*f*), it has now been expressly provided, that a set-off of damages or of costs between parties may be allowed, *notwithstanding the lien* (*g*). However, the set-off may be disallowed (*h*); and the solicitor's lien will not be prejudiced by any such claim to a set-off, if the costs have been incurred (1) in different actions (*i*),—even although consolidated (*k*),—or have been incurred (2) in proceedings in different Divisions of the Court (*l*).

Compromises may (but don't usually) defeat the lien.

A compromise of the action, if it has been fairly entered into, may have the effect of defeating the solicitor's

(*x*) *Re Brookman*, 1909, 2 Ch. 170.
(*y*) *Ackerman* v. *Lockhart*, 1898, 2 Ch. 1.
(*z*) *Belaney* v. *Ffrench*, L. R. 8 Ch. App. 918.
(*a*) *Heslop* v. *Metcalfe*, 3 My. & Cr. 183.
(*b*) *Griffiths* v. *Griffiths*, 2 Ha. 587.
(*c*) *In re Boughton*, 23 Ch. D. 329; and see *In re Dee Estates*, 1911, 2 Ch. 85.
(*d*) *Boden* v. *Hensby*, 1892, 1 Ch. 101.
(*e*) *Cole* v. *Eley*, 1894, 2 Q. B. 350.
(*f*) *Hamer* v. *Giles*, 11 Ch. Div. 942.
(*g*) *Goodfellow* v. *Gray*, 1899, 2 Q. B. 498.
(*h*) *Edwards* v. *Hope*, 14 Q. B. D. 922.
(*i*) *Blakey* v. *Latham*, 41 Ch. Div. 518.
(*k*) *Bake* v. *French*, 1907, 2 Ch. 215.
(*l*) *In re Bassett*, 1896, 1 Q. B. 219.

lien (*m*); but it will not have that effect, if the compromise is purposely designed to defeat the lien, or is otherwise an attempted fraud on the solicitor (*n*), after due notice given of his lien (*o*).

Retention of costs, &c., out of fund.

Where a solicitor, having free moneys of the client in his hands, retains thereout his costs,—that is to say, his "*professional charges*" (which now include his "*disbursements*" (*p*)),—such retention (unless after a proper bill of costs delivered) is not considered a payment of the bill,—so as to prevent taxation (*q*): Also, a settlement of costs with the client will not (necessarily) be a settlement binding on the creditors also of the client, in the event of the client afterwards dying insolvent (*r*),—or binding on the bankruptcy trustee in the event of the client subsequently going bankrupt (*s*). And these two things may, conveniently, be mentioned here,—Firstly, that a solicitor, who has duly delivered his bill of costs, may before taxation of the costs commence his action for their recovery, and obtain judgment therefor, the amount to be certified (*t*); and, Secondly, that the common order for taxation, which directs the solicitor to give credit "*for all sums of money received by him*" on account of the client, is confined to moneys, which the solicitor *in his character of solicitor* has received, or which he is legally or equitably liable *as such solicitor* to pay over to the client, and against which (if the solicitor were sued by the client for the moneys) a set-off for his costs would be available (*u*).

(1) Banker's lien,—on customer's securities.

There are also these further points to be noticed,—in connection with liens (or quasi-liens), that is to say: Firstly, that the lien of a banker (on his customer's securities) is in respect of the customer's *general* balance,

(*m*) *The Hope*, 8 P. D. 144.
(*n*) *In re Margetson and Jones*, 1897, 2 Ch. 314.
(*o*) *Ross* v. *Buxton*, 42 Ch. D. 190.
(*p*) *Sadd* v. *Griffin*, 1908, 2 K. B. 510.
(*q*) *In re Baylis*, 1896, 2 Ch. 107.
(*r*) *Cole* v. *Park*, 41 Ch. D. 326.
(*s*) *Re Van Laun*, 1907, 2 K. B. 23.
(*t*) *Lumley* v. *Brooks*, 41 Ch. D. 323.
(*u*) *In re Le Brasseur and Oakley*, 1896, 2 Ch. 487.

and subsists only where it is not inconsistent with (or superseded by) any specific security (*x*) or specific appropriation (*y*); Secondly, that the lien which arises, where a man agrees to sell an estate and to lend money to the purchaser for improving the estate, is for the advances so made (including the purchase-moneys remaining unpaid (*z*)); and Thirdly, that the lien which arises, where there has been a breach of trust (and some *cestui que trust* has been implicated therein), extends to the whole beneficial interest of the *cestui que trust* in the trust funds,—*Scil.*, so far as it is *equitable*, and not legal.

(2) Vendor's lien for advances for improvements.

(3) Lien on interests of *cestuis que trustent* for their breaches of trust.

If there are two joint-tenants of a lease, and one of them renews the lease for the benefit of both, he will have a lien on the moiety of the other for a moiety of the renewal fine and expenses (*a*). But where two or more purchase an estate, and one of them pays the whole purchase-money, and the estate is conveyed to them both,—The one who pays has neither a lien nor a mortgage, but only a right of action against the other,—*Scil.*, in respect of the proportion of the other; but, upon a subsequent *partition* of the purchased property,—and also upon a subsequent division of the sale-proceeds thereof, where the property is sold by a mortgagee paramount of the entirety (*b*),—the debt of the purchaser (if he still remained un-recouped the co-purchaser's proportion of the purchase-moneys) would be provided for. Also, where one of two joint-lessees (occupiers of a house) redecorates it at his own expense, he has no lien in respect of his outlay (*c*); and in such a case, he may have no action even; but upon a subsequent *partition* of the property, compensation might be made him for what he had properly expended (*d*),—*Scil.*, in respect of the increase in the selling value by reason of such expenditure.

(4) Joint-tenant's lien for costs of renewing lease.

(*x*) *In re European Bank*, L. R. 8 Ch. App. 41.
(*y*) *Hill* v. *Smith*, 12 Mee. & W. 618.
(*z*) *Ex parte Linden*, 1 Mont. D. & D. 435.
(*a*) *Ex parte Grace*, 1 B. & P. 376.
(*b*) *Lawledge* v. *Tyndall*, 1896, 1 Ch. 923.
(*c*) *Leigh* v. *Dickeson*, 5 Q. B. D. 60.
(*d*) *In re Jones*, 1893, 2 Ch. 461.

(5) Lien of company,—on shares.

A limited company, by virtue of its articles of association, may be,—and usually is,—entitled to a lien on the shares of its members, for any debt or liability of the member to the company; and where such a lien exists, its extent depends upon the relevant provisions contained in the articles for the time being of the company (*e*); and the lien may extend to include the secret profits of a director of the company (*f*).

(*e*) *Baily* v. *British Equitable*, 1906, A. C. 35.
(*f*) *Bodega Company case*, 1904, 1 Ch. 276.

CHAPTER XX.

PENALTIES AND FORFEITURES.

SECTION I. PENALTIES,—RELIEF FROM.

THE doctrine of equity, with regard to penalty-clauses in instruments, is,— Penalty, deemed accessory, and compensation decreed.

Firstly, that wherever the clause is inserted merely to secure the performance of some act (or the enjoyment of some benefit), the performance of the act (or the enjoyment of the benefit) is the substantial intent of the instrument, and the penalty is only accessory (*a*); and

Secondly, that, in the case of bonds to secure a mere debt (and in which the penal sum is usually double the debt), the obligee shall recover only his principal interest and costs,—and that he shall never recover more than the amount of the penalty: And, therefore, such a bond-creditor cannot issue a specially indorsed writ for the recovery of the penalty (*b*); and he must show some very special grounds for that, if he is ever to succeed in that:

That is to say,—Firstly, if the penalty is to secure the mere payment of money, Courts of Equity will,—and (since the 4 & 5 Anne c. 16, s. 12) Courts of law also will,—relieve upon payment of principal and interest (*c*); and, Secondly, if the penalty is to secure the performance of some act, the Court will (in case of non-performance of the act) ascertain (if possible) the amount of the damages, and will relieve on payment of that amount only; but, Thirdly, as was observed by Lord St. Leonards (*d*),— Party cannot avoid the

(*a*) *Sloman* v. *Walter*, 1 Bro. C. C. 418.
(*b*) *Tuther* v. *Caralampi*, 21 Q. B. D. 414.
(*c*) *Elliott* v. *Turner*, 13 Sim. 477; *Hatton* v. *Harris*, 1892, A. C. 547.
(*d*) *French* v. *Macale*, 2 Drew. & War. 274.

contract by paying the penalty.

"If a thing is agreed to be done (though there be a penalty annexed to its non-performance), *the very thing itself must be done*,"—wherefore a judgment obtained on the bond would stand as a security only for the due performance of the act (*e*).

The performance of the act will, also, in the general case, be enforced by injunction (*f*); and, occasionally, you may have your choice between the injunction and the penalty (or damages (*g*)); but (far more usually) you have your injunction for the future, and damages for the past (*h*).

Where covenantor may do either of two things, paying higher for one alternative than the other,—that is not a case of penalty.

Where the contract is alternative, and the real intent is, that the party bound thereby shall have either of the two alternatives to choose between, and that if he elect to adopt the one, he shall pay a certain sum of money, and if he elect to adopt the other, an additional sum of money,—In such a case, equity will look upon the additional payment as a sum agreed upon, and not as a penalty: For example, if a man lets meadow-land for two guineas an acre; and the contract is, that if the tenant employs the land in tillage, he shall pay an additional rent of two guineas an acre,—There the breaking-up of the meadow-land is an act permitted by the contract (*i*),—a different contract altogether from an agreement not to do a thing (with a penalty for doing it (*k*)): But, even in the case of such tillage-contracts, the intention may be to prohibit the act,—In which latter case, the remedy by injunction would be available, save so far as it has now been excluded by the provisions of the Agricultural Holdings Act, 1908 (*l*); and if the plaintiff was too late to get his injunction, the damage sustained would be recoverable. Also, the option may not be with the wrongdoer at all,

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(*e*) *Moorecroft* v. *Dowding*, 2 P. Wms. 313.
(*f*) *Att.-Gen.* v. *Ashborne Recreation*, 1903, 1 Ch. 101.
(*g*) *General Accidents* v. *Noel*, 1902, 1 K. B. 377.
(*h*) *Hole* v. *Chard Union*, 1894, 1 Ch. 293.
(*i*) *G. N. Rail. Co.* v. *Winder*, 1892, 2 Q. B. 595.
(*k*) *Willson* v. *Love*, 1896, 1 Q. B. 626.
(*l*) 8 Edw. VII. c. 28, ss. 25, 26.

but may be with the party injured,—to have the injunction or else the damages at his option (*m*).

Rules as to distinction between a penalty and liquidated damages.

It is necessary in all cases, therefore, to distinguish between a penalty and what is not a penalty; and the following rules have (for this purpose) been laid down:—

(1) Where the payment of a smaller sum is secured by a larger, the larger sum is a penalty (*n*);

(2) Where the agreement stipulates for the performance of several acts, and *one and the same sum* is expressed to be payable for the breach of *all* or *any* of the stipulations,—That sum is,—in general (*o*), but not invariably (*p*),—a penalty;

(3) Where the payment stipulated for is exactly proportioned to the particular breach (*q*),—and especially if it is expressed in the contract, that the payment is to bear INTEREST from the date of the breach,—In such a case, the payment will not be a penalty at all (*r*);

(3a) Where there was a lease of coal and iron, and the lessees had the liberty of placing slag from their blast-furnaces on the land demised; and they covenanted to pay to the lessor £100 *per acre* for all land not restored to its original agricultural condition at a particular date, —The £100 per acre was recoverable in full (*s*);

(4) If there is only one event on which the money is to become payable, *and there is no means of ascertaining the damage resulting to the plaintiff from the breach,* the specified sum is, in fact, the agreed amount of the compensation in order to avoid the difficulty (*t*),—Because, generally, where the damages from the breach cannot be measured, the contract must be taken to mean, that the sum agreed on was to be liquidated damages, and not a penalty (*u*);

Also (5) The mere use of the term "penalty" or "liquidated damages" is not conclusive of the matter (*x*);

(*m*) *Weston* v. *Metrop. Asylums*, 9 Q. B. D. 404.
(*n*) *Protector Endowment Co.* v. *Grice*, 5 Q. B. D. 592.
(*o*) *Kemble* v. *Farren*, 6 Bing. 141.
(*p*) *Pye's case*, 1906, 1 K. B. 425.
(*q*) *Elphinstone* v. *Monkland Iron and Coal Co.*, 11 App. Ca. 332.
(*r*) *Clydebank case*, 1905, A. C. 6.
(*s*) *Elphinstone* v. *Monkland Iron and Coal Co.*, *supra.*
(*t*) *Sainter* v. *Ferguson*, 7 C. B. 730.
(*u*) *Wallis* v. *Smith*, 21 Ch. Div. 243.
(*x*) *Kemble* v. *Farren*, *supra.*

and a sum, although called a "penalty," may be "liquidated damages" (*y*); and in case of ambiguity, the Court leans in favour of the construction which treats the sum as a penalty,—*Scil.*, in order to relieve against it.

Penalties are odious in law, —example of this.

Where there is a building contract with a penalty,—and (by the terms of the contract) £*x* per day is made payable by A. to B. (by way of penalty), in case of A.'s default to complete the buildings within the time appointed by the contract,—The penalty will not be recoverable at all by B., *if the default of A. is really attributable to B.'s own act* (*z*),—*Scil.*, because penalties are *odious in law* (*a*).

Penalty,— not a penalty when the circumstances are exceptional.

Where there was a mortgage, with a bond collateral thereto,—and the amount of the mortgage debt (together with the arrears of the interest due thereon) exceeded the penalty of the bond, the whole amount was recoverable, —*Scil.*, on the mortgage (*b*); and where a sum of £4,800 was due from A. to B., and B. agreed to take £2,400 in discharge,—on obtaining proper security for that,—but with a proviso that the whole original £4,800 should again become and be payable, in case of default in payment of the £2,400,—The £4,800 was held not to be a penalty, or relievable as such (*c*).

Section II. Forfeitures,—Relief from.

Forfeitures governed by same principles as penalties,— in general.

Forfeiture for non-payment of rent.

The principles which govern the Court in relieving against penalties apply also, generally, to the relief against forfeitures,—other than forfeitures arising under wills and settlements (*d*), and other than forfeitures arising under leases and other strict contracts (*e*). But, even in the case of leases, equity would have interfered (to a limited extent) to relieve against a forfeiture,—For ex-

(*y*) *Diestal* v. *Stevenson*, 1906, 2 K. B. 345.
(*z*) *Holme* v. *Guppy*, 3 Mee. & W. 387.
(*a*) Comyns Dig., Condition L. (6).
(*b*) *Clarke* v. *Lord Abingdon*, 17 Ves. 106.
(*c*) *Thompson* v. *Hudson*, L. R. 4 H. L. 1.
(*d*) *Samuel* v. *Samuel*, 12 Ch. Div. 152; *Otway* v. *Otway*, 1895, 2 Ch. 235.
(*e*) *Warner* v. *Moir*, 25 Ch. Div. 605.

ample, a forfeiture for non-payment of rent (on the lessee paying the rent (*f*)),—*Scil.*, because the rent in arrear was a mere money demand, the purpose of the clause of re-entry for the non-payment of it being only,—in the general case (*g*), but not invariably (*h*),—to secure the payment (*i*); and the Courts of law also were (after a time) enabled (by the Common Law Procedure Acts, 1852 (*k*), and 1860 (*l*)), to relieve in such a case (*m*).

Forfeiture for breach of covenant to repair, or for breach of covenant to insure.

But as regards the other provisions and covenants contained in leases, it was not quite settled, whether equity could (but the better opinion was, that equity could not) have relieved against a forfeiture arising from (*e.g.*) a breach of the covenant to repair (*n*),—although equity would have required the covenantee to be satisfied with a *substantial* performance of the covenant(*o*): And, of course, the covenantee was required, in all cases, to prove the breach of covenant (*p*),—and to prove it by his own evidence (*q*): And it was perfectly well settled, that equity would not (nor could) relieve against a forfeiture for breach of the covenant to insure (*r*).

Relief under the Conveyancing Acts, 1881 and 1892.

By the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 14 (as between lessor and lessee, or under-lessor and under-lessee (*s*)),—and by the Conveyancing Act, 1892 (55 & 56 Vict. c. 13), s. 2 (as between lessor and under-lessee),—The High Court, in each Division thereof, is now enabled to give relief,—upon equitable terms (to be prescribed by the Court), and upon paying to the lessor the costs and expenses (if any) incurred by the latter of and incidental to the breach of covenant,—against every for-

(*f*) Freem. Ch. Rep. 114; *Bowser* v. *Colby*, 1 Hare, 126.
(*g*) *Wadman* v. *Calcraft*, 10 Ves. 67.
(*h*) *Galbraith* v. *Poynton*, 1905, 2 K. B. 258.
(*i*) *Wadman* v. *Calcraft*, *supra*.
(*k*) 15 & 16 Vict. c. 76, s. 212.
(*l*) 23 & 24 Vict. c. 126, s. 1.
(*m*) *Howard* v. *Fanshawe*, 1895, 2 Ch. 581.
(*n*) *Hill* v. *Barclay*, 18 Ves. 62.
(*o*) *Hill* v. *Barclay*, *supra*; *Gregory* v. *Wilson*, 9 Hare, 683.
(*p*) *Croft* v. *Lumley*, 6 H. L. Ca. 672; *Rush* v. *Lucas*, 1910, 1 Ch. 437.
(*q*) *Doe* d. *Bridges* v. *Whitehead*, 8 A. & E. 571.
(*r*) *Green* v. *Bridges*, 4 Sim. 96.
(*s*) *Fletcher* v. *Nokes*, 1897, 1 Ch. 271.

feiture for breach of any covenant whatsoever (*t*), contained in the lease or under-lease or fee-farm grant,—or agreement for a lease or under-lease,—other than and except only the following covenants and conditions, that is to say:—

(1) The covenant not to assign or underlet (*u*);

(2) The condition of forfeiture upon a bankruptcy, liquidation, or execution; and

(3) The covenant in a mining lease for permitting inspection, &c., by the lessor; and, of course,

(4) The covenant to pay rent (the relief against that having needed no express provision).

The forfeiture on a bankruptcy (liquidation or execution) may now be relieved against—in certain cases, and under certain restrictions (*x*),—*Scil.*, if the lease should be sold within a year. Also, in favour of an innocent and blameless under-lessee (as distinguished from the lessor himself) the forfeiture resulting from a breach of the covenant not to underlet, may be (in effect) relieved against: *Secus*, if the under-lessee is not entirely blameless (*y*).

The relief provided by the Conveyancing Acts, 1881, 1892, is obtainable either in an action or on a counter-claim (*z*),—but is not obtainable,—as of right (*a*), but only by way of indulgence (*b*),—after actual entry by the lessor for the forfeiture: In which latter respect (as well as in the nature of the breach of covenant which is relieved against), the relief under these Acts differs from the relief obtainable under the Common Law Procedure Acts,—this latter relief being obtainable, as of right, even after actual entry by the lessor (*c*),—or after an ejectment commenced (*d*).

(*t*) *Gray* v. *Bonsall*, 1904, 1 K. B. 601.
(*u*) *Barrow* v. *Isaacs*, 1891, 1 Q. B. 417.
(*x*) 55 & 56 Vict. c. 13.
(*y*) *Imray* v. *Oakshette*, 1897, 2 Q. B. 218; *Matthews* v. *Smallwood*, 1910, W. N. 69.
(*z*) *Roger Cholmeley's School* v. *Sewell*, 1893, 2 Q. B. 254.
(*a*) *Rogers* v. *Rice*, 1892, 2 Ch. 170.
(*b*) *Dendy* v. *Evans*, 1909, 2 K. B. 894.
(*c*) *Howard* v. *Fanshawe*, 1895, 2 Ch. 581.
(*d*) *Moore* v. *Smee*, 1907, 2 K. B. 8.

Lessee becoming purchaser, before entry for forfeiture, —effect of.

Where the lease or tenancy-agreement contains an option of purchase in the lessee, and the option is exercised by the lessee (or by his legal assignee) before the lessor proceeds to exercise (for due cause) his power to forfeit the leasehold interest,—The position of the lessee (or of his assignee) is transmuted into that of purchaser, and is no longer liable to the forfeiture to which he was liable while lessee (*e*). And where there is a building agreement, and the building lessee is entitled to have leases (*piecemeal*) as the buildings are completed,—The right to any lease (if it have meanwhile completely arisen) will not be forfeitable, even when the building agreement itself has since become forfeitable (*f*).

Builder entitled to leases piecemeal,—effect.

Incidents of tenure,—forfeitures in respect of, relief from,—only in exceptional cases.

In the case of the other strict contracts above referred to,—Firstly, in the case of WILLS, Equity was (comparatively) powerless (and also indisposed) to relieve,—*Scil.*, because the beneficiaries entitled under the will were (all of them) volunteers, and no one of them (more than any other of them) entitled to be treated with any exceptional favour,—more especially as against the next of kin; But still, even in the case of wills, equity required (*e.g.*), that the ground for an alleged forfeiture should,—as regards the real and true *substance* of the thing,—be proved (*g*); and, Secondly, as regards forfeitures which were incident to tenures,—equity would (but under special circumstances only) have granted relief against the forfeiture: For example, in *Peachy* v. *Somerset* (*Duke*) (*h*), where the owner of certain copyhold lands made a lease of the lands for seven years, *without first obtaining the licence of the lord of the manor to make the lease*,—and a forfeiture was incurred thereby,—The jurisdiction to relieve against the forfeiture was acknowledged: Also, in *Andrews* v. *Hulse* (*i*),—the jurisdiction was unequivocally asserted: But the relief will not ordinarily be granted in such cases; and it has, in fact, been sometimes stated generally,—but too generally,—that the Court cannot (nor will) relieve against any forfeiture

(*e*) *Raffety* v. *Schofield*, 1897, 1 Ch. 957.
(*f*) *Lowther* v. *Heaver*, 41 Ch. D. 248.
(*g*) *Samuel* v. *Samuel*, 12 Ch. D. 152.
(*h*) 1 Str. 447.
(*i*) 4 K. & J. 392.

that is an "*incident of tenure*:" That is to say, if the forfeiture is the only relief,—or the only appropriate relief,—available to the lord of the manor (*k*), and to give him damages merely would not suffice (*l*),—The Court will not relieve the copyholder: And, in *Cox* v. *Higford* (*m*), where the plaintiff (a copyholder) sued for relief against the forfeiture of his tenement,—the forfeiture in that case having been on account of waste committed (or permitted) by the plaintiff; and it appeared, that the plaintiff had neglected (for about thirty years altogether) to repair his tenement, although he had been repeatedly required by the lord to repair it,—The Court refused the relief,—*Scil.*, because of the wilful obstinacy of the plaintiff, and because (as appears from the report) the lord had already recovered the premises in ejectment, and had since then been (for about nine years) in the possession of the tenement by his occupying tenant.

Forfeiture,—occasionally treated as a penalty, and relieved as such.

Occasionally,—and especially in favour of a public body,—the Court will treat the forfeiture clause in a lease (or fee simple purchase) as a penal clause,—in order to relieve against the forfeiture (*n*); but a lease which has been made under the provisions of some statute, and which (by the terms of the statute) is expressly ended in a certain event, cannot be so treated (*o*).

(*k*) *Galbraith* v. *Poynton*, 1905, 2 K. B. 258.
(*l*) *Blackmore* v. *White*, 1899, 1 Q. B. 293.
(*m*) 2 Vern. 664.
(*n*) *Dagenham Docks case*, L. R. 8 Ch. App. 1022.
(*o*) *Carrick* v. *Miller*, L. R. 1 H. L. Sc. 356.

CHAPTER XXI.

MARRIED WOMEN.

SECT. I. SEPARATE ESTATE.
Sub-sect. 1,—*Apart from Legislation.*
Sub-sect. 2. *The Effects of Legislation.*—
SECT. II. PIN MONEY AND PARAPHERNALIA.
SECT. III. EQUITY TO A SETTLEMENT, AND RIGHT OF SURVIVORSHIP.
SECT. IV. SETTLEMENTS IN DEROGATION OF MARITAL RIGHTS.

Rights of husband, by the common law.

BY the common law, a husband on marrying became entitled,—

Firstly, As regards his wife's *Real* Estate,—To the rents and profits thereof during the joint lives (*i.e.*, during the coverture),—and (in general) to an estate for his life by the curtesy thereafter:

And, Secondly, As regards her personal estate,—The wife's chattels personal in possession passed to the husband absolutely; and her choses in action passed to the husband absolutely, *subject only to his reducing them into possession during the coverture*,—or, if he did not *but survived her*, he (*a*),—and (after his death) his administrator (*b*),—was entitled, *on taking out administration to the wife*, to recover these choses in action; and her chattels real (*i.e.*, her leaseholds) passed into the husband *jure mariti*,—with full power to aliene them (*inter vivos*) for the whole term of the lease; and that was so, even when the leaseholds were reversionary (*c*),—provided only the reversion was capable of falling into possession during the coverture (*d*).

On the other hand, if the wife *survived* the husband, then (firstly) all her choses in action which he had not

(*a*) *Smart* v. *Tranter*, 43 Ch. Div. 587.
(*b*) *Fleet* v. *Perrins*, L. R. 3 Q. B. 536.
(*c*) *In re Bellamy*, 25 Ch. D. 620.
(*d*) *Duberley* v. *Day*, 16 Beav. 33.

reduced into possession, and also (secondly) all her leaseholds which he had not aliened *inter vivos* absolutely for the whole term of the lease, survived to the wife; and if the husband's alienation of the leaseholds had been of part only, the residue of the leaseholds survived to the wife; and if his alienation of the leaseholds had been by way of mortgage only, then the leaseholds survived wholly to the wife,—but subject to the mortgage (being an *alienatio rei*, and not a mere "*charge*" (*e*)).

Interference of equity.

The husband acquired these extensive interests in the property of his wife, in consideration of the obligation which (upon the marriage) he contracted of maintaining her; but the law gave the wife no remedy whatever, in case of his neglecting that obligation,—and it was chiefly for that reason, that equity raised up (with reference to married women) the new law of the "*separate estate*" of the wife. And so beneficial was this new law found (by experience) to be, that it at length received legislative sanction in the Married Women's Property Act, 1870, amended by the Married Women's Property Act, 1874,—Both which Acts were afterwards consolidated and amended by the Married Women's Property Act, 1882; and the last-mentioned Act has itself been recently amended by the Married Women's Property Acts, 1893 and 1907,—the provisions of all which successive Acts are hereinafter more particularly stated.

Section I. The Wife's Separate Estate.

Sub-sect. 1.—*Apart from Legislation.*

Feme covert could not, at common law, hold property apart from her husband: but she might do so in equity.

At common law, the existence of the wife, as a legal entity (or *persona*) separate and distinct from her husband, was not recognised (she being considered merged in her husband (*f*)): But, in equity, the case was different,—a married woman being there considered capable of hold-

(*e*) Co. Litt. 185b; *Lord Abergavenny's case*, 6 Rep. 78b; Challis (2nd ed.), 335, *n*.

(*f*) *Murray* v. *Barlee*, 3 My. & K. 220.

ing property, independently of her husband, for her own separate use; and once having been permitted to *hold* property to her separate use, she held it with all the incidents of property,—including the *jus disponendi* (that is, the right of alienation (*g*)), and the *jus defendendi* (that is, the right of pleading [*e.g.*] the Statutes of Limitation in defence of her separate estate (*h*)).

Separate estate, how created.

The separate estate may be variously created:—

(1) By ante-nuptial agreement with the intended husband,—such agreement being made with reference either to the wife's own property, or with reference to the property of her husband, or of third parties;

(2) By post-nuptial agreement,—express (*i*) or implied (*k*),—with her husband;

(3) By virtue of a separation deed; but this species of separate estate comes to an end, in general, with the resumption of the cohabitation (*l*),—unless the separation deed (being in the nature of a settlement) expressly otherwise provides (*m*);

(4) Under a private Act of Parliament, operating as a settlement;

(5) By gifts from the husband to his wife,—being gifts made to her absolutely (*n*), and not merely to be worn by her for his gratification (*o*); also, gifts from a stranger (by delivery to the wife (*p*));

(6) By the wife trading separately (*q*); and

(7) By express limitation (by deed or will) to her for her separate use,—this latter having been the most frequent source of the separate estate,—*Scil.*, prior to the Married Women's Property Acts above referred to.

(*g*) *Fettiplace* v. *Gorges*, 1 Ves. Jr. 48.
(*h*) *Hallett* v. *Hastings*, 35 Ch. D. 94.
(*i*) *Pye* v. *Pye*, 13 Q. B. D. 147.
(*k*) *Slanning* v. *Style*, 3 P. Wms. 334 (the wife's "butter-money").
(*l*) *Nicol* v. *Nicol*, 31 Ch. Div. 524.
(*m*) *Spark* v. *Massey*, 1904, 1 Ch. 451.
(*n*) *Tasker* v. *Tasker*, 1895, P. 1.
(*o*) *Baddeley* v. *Baddeley*, 9 Ch. Div. 113; and disting. *Masson* v. *De Fries*, 1909, 2 K. B. 831.
(*p*) *Graham* v. *Londonderry*, 3 Atk. 393.
(*q*) *Ex parte Shepherd*, 10 Ch. Div. 573.

Interposition of trustees not necessary, —since (failing any other trustee) the husband is trustee for the wife.

It was at one time supposed, that the interposition of trustees was indispensable for the protection of the wife's interests; but it was afterwards established, that the intervention of trustees was not indispensable; and the husband (as having the legal estate) was held to be a trustee for his wife (*r*). And, now, under the Married Women's Property Act, 1882, the intervention of a trustee is in no case necessary (*s*),—nor is a trustee now necessary in a separation deed even (*t*).

What words held sufficient to create the separate use.

What words held not sufficient for that purpose.

No particular form of words was (or is) necessary, in order to create the separate use,—so that a gift to the wife "for her own use, and at her disposal" (*u*), or "for her own use, independent of her husband" (*x*), or "so as that she shall receive and enjoy the issues and profits" (*y*),—will suffice: On the other hand, no separate use would be created, where there was (*e.g.*) a mere direction "to pay to a married woman or her assigns" (*z*); or where there was a gift "to her own use and benefit," or to her "absolute use" (*a*); or where the payment directed to be made was "into her own proper hands, to and for her own use and benefit" (*b*),—*Scil.*, because none of these expressions excluded the common law rights of the husband.

The wife's power of disposition over separate estate;

(a) As to personalty.

According to the decision in *Peacock* v. *Monk* (*c*), a married woman, acting in respect of her separate property, acts as if she were a *feme sole:* Therefore, all *personal* property settled upon her for her separate use may be alienated by her without her husband's consent,—and either by act *inter vivos*, or by her will,—and whether the interest is in reversion or is in possession (*d*): But,

(*r*) *Wassell* v. *Leggatt*, 1896, 1 Ch. 554.
(*s*) *Cuno* v. *Mansfield*, 43 Ch. D. 12.
(*t*) *Sweet* v. *Sweet*, 1895, 1 Q. B. 12.
(*u*) *Inglefield* v. *Coghlan*, 2 Coll. 247.
(*x*) *Wagstaff* v. *Smith*, 9 Ves. 520.
(*y*) *Tyrrell* v. *Hope*, 2 Atk. 558.
(*z*) *Lumb* v. *Milnes*, 5 Ves. 517.
(*a*) *Ex parte Abbot*, 1 Deacon, 338.
(*b*) *Tyler* v. *Lake*, 2 Russ. & My. 183.
(*c*) 2 Ves. Sr. 190.
(*d*) *Sturgis* v. *Corp*, 13 Ves. 190.

(b) As to realty.

as regards her *real* estate, settled to her separate use,—This distinction used to be taken, namely, that her life interest she could dispose of (*e*); but her fee simple (*f*),—and *a fortiori* her fee tail,—she could not dispose of, save (possibly) to the extent of the *equitable* interest therein: However, that sort of distinction, *semble*, is now (for all practical purposes) at an end,—save (possibly) as regards estates in tail: But a married woman may not (even yet) dispose of her life-estate under a separation deed (*g*),—nor of her alimony (*h*), or the like (*i*).

Husband's estate by the curtesy.—question as to;

Upon the question, whether the wife's disposition by deed or by will of her fee simple estates, deprives the husband (surviving her) of his curtesy estate,—assuming that he would otherwise be entitled thereto,—the rule of the Court (which at first wavered) is now fully settled as follows, namely,—That although, in the absence of (or subject to) any such disposition by the wife, the husband is entitled to his curtesy, *even out of statutory separate property* (*k*),—yet, in case the wife disposes of the whole estate by deed *inter vivos*, or even by her will, the husband is (by such disposition) wholly barred and excluded from his estate by the curtesy (*l*). And, as regards the husband's rights in the copyhold estates of his wife,—although such rights (as existing by the particular customs of the manor) may extend (*e.g.*, in the manor of Taunton Dean) beyond a mere curtesy estate,—These rights are now, *semble*, wholly barred by the disposition of the wife.

and as to his interests in wife's copyholds.

The savings of income of separate estate are also separate estate.

If a married woman effect any savings out of the property which is settled to her separate use, she has the same power over the savings that she has over the separate estate itself,—For if the wife has a power over the capital, she has also a power over the income and accumulations (*m*); and the like rule applies also to savings out

(*e*) *Stead* v. *Nelson*, 2 Beav. 245.
(*f*) *Taylor* v. *Meads*, 34 L. J. Ch. 203.
(*g*) *Hyde* v. *Price*, 3 Ves. 437.
(*h*) *In re Robinson*, 27 Ch. D. 160.
(*i*) *Watkins* v. *Watkins*, 1896, P. 222.
(*k*) *Hope* v. *Hope*, 1892, 2 Ch. 336.
(*l*) *Cooper* v. *M'Donald*, 7 Ch. Div. 288.
(*m*) *Newlands* v. *Paynter*, 4 My. & Cr. 408.

of the income allowed to the wife under a separation deed (*n*), or upon her husband's lunacy (*o*). And the investments also made with such savings (or with the accumulations thereof) belong to the married woman for her separate use (*p*),—a result which used not (formerly) to hold good for the investments of her *capital* moneys (*q*).

Wife may permit her husband to receive the income of her separate estate:

The wife may, of course, give her separate income to her husband (or permit him to receive it); and if the husband and wife are living together, and have for a long time so dealt with the separate income of the wife as to show that they *must* have agreed to the husband receiving it,—That is evidence of a gift by her to him of the separate income (*r*). And even where she is entitled to an account against him of his receipts of her separate income, the general rule is, that he shall be obliged to account for one year's receipts only (*s*); and, of course, if she have made a gift of her separate income to him, she is not entitled to any account whatever of it (*t*): But the onus of proving such a gift is on the husband (*u*),—and the onus is difficult to satisfy (*v*),—and more especially so, where the alleged gift is of the corpus or capital (*x*).

and will be entitled to only one year's account, if to any account at all.

Husband, on wife's death, takes separate personal estate undisposed of.

If a *feme covert*, having personal estate settled to her separate use, dies without disposing of it, the husband is entitled to it, for his own benefit, but subject to the wife's debts (*y*); and all those parts of it which consist of cash furniture or other personal chattels in possession (or of chattels real (*z*)), he takes in his marital right (*a*); and all those parts of it which consist of "choses in action,"

(*n*) *Crouch* v. *Waller*, 4 De G. & J. 802.
(*o*) *Re Tharp*, 3 Prob. Div. 76.
(*p*) *Barrack* v. *M'Culloch*, 3 K. & J. 110.
(*q*) *Wright* v. *Wright*, 2 J. & H. 647.
(*r*) *Dixon* v. *Dixon*, 9 Ch. Div. 587.
(*s*) *Darkin* v. *Darkin*, 17 Beav. 578.
(*t*) *Rich* v. *Cockell*, 9 Ves. 369; *Edwards* v. *Cheyne*, 13 App. Ca. 385.
(*u*) *Wood* v. *Cock*, 40 Ch. Div. 461.
(*v*) *Mercier* v. *Mercier*, 1903, 2 Ch. 98.
(*x*) *Wassell* v. *Leggatt*, 1896, 1 Ch. 557.
(*y*) *Surman* v. *Wharton*, 1891, 1 Q. B. 491.
(*z*) Co. Litt. 46 *b*; Dyer, 251.
(*a*) 29 Car. II. c. 3, s. 25; *Elder* v. *Pearson*, 25 Ch. Div. 620.

he takes as his wife's administrator (*b*),—but to his own use (*c*).

Property subject to a general power of appointment in wife.

Where a married woman had a general power of appointment over property, and she exercised the power, she did not thereby (in the general case, at least) make the appointed property assets for the payment of her debts in an administration of her estate; and her appointment of an executor, just as it was not a disposition of her separate estate (*d*), so it was not an exercise of her general power of appointment (*e*). But where personal property was given to a married woman for her separate use for life, with remainder as she should (by deed or will) appoint, *with remainder to her executors or administrators*, the gift was held to be a gift to her absolutely for her sole and separate use (*f*): And now, under the Married Women's Property Act, 1882, the property (if appointed by her) will be assets for the payment of the married woman's debts, where her separate estate would be assets (*g*),—even when the power to appoint is exerciseable by will only (*h*). Also, *semble*, her mere appointment of executors will, where her own estate is insufficient for the payment of the debts and legacies, operate as an exercise of her general power of appointment to the extent required for the payment of those debts and legacies (*i*).

A *feme covert* could not originally bind her separate estate with debts.

Courts of Equity were very slow to admit, that a married woman having separate property could (in her lifetime) bind that property with her debts; but, after a time, the Courts ventured so far as to hold, that if she made a written contract for the payment of money,—by, *e.g.*, a bond under her hand and seal (*k*),—her separate property should, in that case, be made liable for payment of the debt; and the principle of that decision was subsequently extended to bills of exchange (*l*), and to pro-

(*b*) 29 Car. II. c. 3, s. 25; *Elder* v. *Pearson*, 25 Ch. Div. 620.
(*c*) *Drew* v. *Leng*, 22 L. J. Ch. 717.
(*d*) *Stanton* v. *Lambert*, 39 Ch. Div. 626.
(*e*) *Thurston* v. *Evans*, 32 Ch. Div. 508.
(*f*) *London Chartered Bank* v. *Lempriere*, L. R. 4 P. C. 572.
(*g*) *Wilson* v. *Ann*, 1894, 1 Ch. 549.
(*h*) *Turner* v. *King*, 1895, 1 Ch. 361.
(*i*) *In re Seabrook, Gray* v. *Baddeley*, 1911, 1 Ch. 151.
(*k*) *Heatley* v. *Thomas*, 15 Ves. 596.
(*l*) *M'Henry* v. *Davies*, L. R. 10 Eq. 88.

missory notes (*m*),—and ultimately, to any written contracts whatsoever (*n*). But the Courts still refused to hold a married woman bound by her mere *verbal* agreement,—For (it was said) the married woman's disposition of her separate estate was in the nature of the execution of a *power* (and only an instrument in writing would operate as an execution of the power); or, if the married woman's disposition was not like the execution of a power, it operated at all events to specifically *charge* her separate estate, and a written instrument (it was said) was indispensable to create such a charge: Eventually, however, it was decided, that a married woman, *contracting for herself in respect of her separate estate,* was bound by her contract, although such contract was by word of mouth only (*o*).

Courts now hold, that to the same extent that she is regarded as a *feme sole*, she may contract debts; and accordingly,—her verbal engagements now binding on her separate estate.

What separate estate was originally bound by *contract* of wife;

But the Courts still evinced the greatest aversion to extending the liability of the separate estate,—and they held, in fact, that the general engagements of the married woman (*entered into during the coverture*) could be enforced *only against so much of her separate estate as she was entitled to at the date of entering into the engagement* (and as remained at the date of entering up judgment and suing out execution thereon),—*and* NOT *against any separate estate to which she became entitled after the date of entering into the engagement* (*p*): And it was not until the Married Women's Property Act, 1882, that the liability of the separate estate was extended (by s. 1, sub-s. 4), to such after-acquired estate. Also, it was only at a very late period, that the separate estate of a married woman (committing a *fraud*) was held liable to make good her fraud (*q*); and where she had concurred in a breach of trust, her separate estate was made liable, only if she had been an "*actual actor*" in the breach (*r*): All which rules were right enough under the old law,—the fraud (or other tort) of the wife having then been (in law) the fraud (or tort) of her husband,—

and what separate estate is now bound under Act of 1882.

Separate estate,—not liable, formerly, for wife's *torts;*

(*m*) *Bullpin* v. *Clarke*, 17 Ves. 365.
(*n*) *Murray* v. *Barlee*, 3 My. & K. 209.
(*o*) *Mathewman's case*, L. R. 3 Eq. 787.
(*p*) *Pike* v. *Fitzgibbon*, 17 Ch. Div. 454.
(*q*) *Vaughan* v. *Vanderstegen*, 2 Drew. 165, 363, 408.
(*r*) *Sawyer* v. *Sawyer*, 28 Ch. Div. 595.

and not of herself (*s*); but, by the Married Women's Property Act, 1882, s. 24, the married woman is now liable for any breach of trust or devastavit committed by her, either before or after her marriage,—saving and excepting always where the separate estate is subject to the restraint on anticipation, which is hereinafter dealt with.

but is, now, liable.

It was necessary under the Act of 1882, that (the married woman's contract having been made on or after the 1st January, 1883 (*t*)) she should have had some separate property at the date of entering into the contract (*u*),—Which being shown, it was not necessary also to show, that the wife had separate estate at the date of entering up the judgment (*x*): But, under the Married Women's Property Act, 1893 (*y*), every contract, which (on or after the 5th December, 1893) is entered into by a married woman (otherwise than as agent for her husband or another) *is deemed to have been entered into with reference to (and so as to bind) her separate estate,—whether she is possessed of separate estate at the time or not;* and the liability is *enforceable* against all the property which the married woman becomes entitled to thereafter, and even *after the coverture is ended.*

Married Women's Property Act, 1893,—Liability of separate estate enlarged.

In equity, no *personal* decree was ever made against a married woman (*z*); and, for example, no bankruptcy decree (or order for her imprisonment), under the Bankruptcy Act, 1883 (or under the Debtors Act, 1869), would have been made against her (*a*); but, under the Married Women's Property Act, 1882 (*b*), a married woman carrying on a trade separately from her husband is (in respect of her separate trade property) made subject to the bankruptcy laws in the same way as if she were a *feme sole* (*c*). However, even yet, if she is not carrying on a separate trade, she is not liable to be made a bank-

No personal decree against a *feme covert*.

Married woman, trading separately, may now be made bankrupt;

(*s*) *Wainford* v. *Heil*, L. R. 20 Eq. 321.
(*t*) *Turnbull* v. *Forman*, 15 Q. B. D. 234.
(*u*) *Palliser* v. *Gurney*, 19 Q. B. D. 519.
(*x*) *Downe* v. *Fletcher*, 21 Q. B. D. 11; *Beck* v. *Pierce*, 23 Q. B. D. 316.
(*y*) 56 & 57 Vict. c. 63, s. 1.
(*z*) *Francis* v. *Wigzell*, 1 Mad. 264.
(*a*) *Ex parte Holland*, L. R. 9 Ch. App. 307.
(*b*) 45 & 46 Vict. c. 75, s. 1, sub-s. 5.
(*c*) *In re Simon*, 1909, 1 K. B. 201.

rupt (*d*),—not even when she is afterwards left a widow,—at least upon a judgment against her husband and herself obtained on her *contract* made during the coverture (*e*),—*Secus*, on a judgment obtained against her for her *tort* (*f*). Also, although she may be carrying on a separate trade, she is not even now liable to a commitment order, under s. 5 of the Debtors Act, 1869 (*g*); and certain other provisions of the Bankruptcy Act, 1883, which are applicable to an ordinary debtor, are still not available as against a married woman although trading separately (*h*); and (*e.g.*) a bankruptcy notice may not validly issue against her (*i*),—excepting on a judgment against her for her tort (*k*).

but cannot, even yet, be committed for debt.

General engagements bind the *corpus* of her personalty,—and now, even of her realty.

The liability of a married woman upon her contract is a *proprietary* liability (*l*), and (for some purposes) a *personal* liability also,—For the purpose (*e.g.*) of a set-off of costs recovered by her against costs recovered against her (*m*); and a receiver on behalf of the creditor will be appointed in the case of a married woman, equally as in the case of a man,—That is to say, the relief against the separate estate of a *feme covert* was (and still is) effectuated (upon a judgment against her) by means of a charge (*n*); and a receiver is appointed in aid of the charge (*o*), and the whole *corpus* of the estate is liable, the execution only being always limited to such separate estate as she is not effectively restrained from anticipating (*p*); and she may be examined as to what her separate estate consists of (*q*). And, as regards the ante-nuptial debts of a wife (including her torts *before* marriage), the liability for all these survives (in general) against her, if

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(*d*) *Ex parte Coulson*, 20 Q. B. D. 249.
(*e*) *In re Hewett*, 1895, 1 Q. B. 328.
(*f*) *In re Beauchamp*, 1904, 1 K. B. 572.
(*g*) *Robinson* v. *Lynes*, 1894, 2 Q. B. 577.
(*h*) *In re Frances Handford*, 1899, 1 Q. B. 566.
(*i*) *In re Lynes*, 1893, 2 Q. B. 113.
(*k*) *In re Beauchamp*, *supra*.
(*l*) *Holtby* v. *Hodgson*, 24 Q. B. D. 103.
(*m*) *Pelton Brothers* v. *Harrison*, 1892, 1 Q. B. 118.
(*n*) *Bursill* v. *Tanner*, 13 Q. B. D. 691.
(*o*) *Webb* v. *Stenton*, 11 Q. B. D. 518.
(*p*) *Scott* v. *Morley*, 20 Q. B D. 120.
(*q*) *Aylesford* (*Countess*) v. *G. W. Rail. Co.*, 1892, 2 Q. B. 626.

she survive her husband (whether or not the husband may also have become and been liable therefor (*r*)).

Bills for administration of separate estate.

Upon the death of the married woman, her creditors may commence an action against her legal personal representative *for the administration of her separate estate,*— the husband (even when he takes merely *jure mariti*) being, for this purpose, her representative (*s*); and the ante-nuptial debts will be provable, along with the debts contracted by her with reference to her separate estate (*t*). Also, if (being the donee of a general power of appointment) she exercises that power, she thereby, *to the extent that she exercises that power* (*u*), renders the appointment property assets for the payment of her debts contracted after the 31st December, 1882 (*x*),—and even, *semble*, for the payment of her debts contracted before that date (*y*).

Restraint on anticipation, origin of, and necessity for.

A married woman, being at liberty to dispose of her separate property, was in danger of yielding to the solicitations of her husband to dispose of it,—and not unfrequently did so dispose of it, to her own undoing (*z*); and in order to provide against that, the Court sanctioned a provision restraining her anticipation of the income: And inasmuch as the separate estate was purely *the creature of equity*, equity was well able to sanction such a restraint, —*Scil.*, because, although a similar fetter imposed on the property of a man was void as repugnant (*a*), yet *the restraint on anticipation* (*in the case of married women*) *was consistent with, and in furtherance of, the very object of the separate estate;* and, by the law of certain places (*e.g.*, Quebec), a wife's separate property is not mortgageable at all, even for her husband's necessities (*b*), and

(*r*) *Beck* v. *Pierce*, 23 Q. B. D. 316.
(*s*) *Surman* v. *Wharton*, 1891, 1 Q. B. 491.
(*t*) *Bell* v. *Stocker*, 10 Q. B. D. 129.
(*u*) *Darley* v. *Hodgson*, 1899, 1 Ch. 666.
(*x*) *Roper* v. *Doncaster*, 39 Ch. Div. 482.
(*y*) *Cozen* v. *Rowland*, 1894, 1 Ch. 406.
(*z*) *Ellis* v. *Atkinson*, 2 Dick. 759.
(*a*) *Brandon* v. *Robinson*, 18 Ves. 429.
(*b*) *Gauthier's case*, 1904, A. C. 94.

(by the law of the Transvaal) the wife's mortgage, as a surety for her husband, is hedged round with many safeguards (*c*).

The perpetuities rule,—how far applicable to the restraint on anticipation?

The restraint on anticipation is commonly said to be subject to the Rule against Perpetuities,—according to which, no title can be validly conferred on anyone (so as to vest in him or in her), unless the title will (and necessarily will) commence and vest, if at all, in the beneficiary within the period of a specified life in being or of specified lives in being (when the document conferring the title first operates) and the further period of twenty-one years after the extinction of the specified life or of the last survivor of the specified lives: But, if the title itself vests (and necessarily vests) in the beneficiary within the limit of time prescribed by the rule, it is difficult to see why the restraint on anticipation, which is a mere *incident* to the title (or gift), should not be good, notwithstanding that it would (unless lifted off by the Court) operate beyond the limit (*d*): But there is a prevalent opinion to the contrary (*e*).

Restraint on anticipation,—operation of.

The legality of the restraint on anticipation having been once established, the next question which arose was, whether the restraint was confined to the actually existing coverture, or extended to a subsequent marriage; and it was eventually determined, that the restriction extended to a subsequent marriage (*f*). But, of course, the estate must first be separate estate before the restraint on anticipation can be annexed to it,—although now, where the gift (by force of the Married Women's Property Acts) is for the married woman's separate use, there the restraint on anticipation can validly be annexed, without any *express* creation first of the separate estate (*g*). And these propositions may be taken to be now established, namely:—That while a spinster, the female entitled to her separate

(*c*) *Bank of Africa* v. *Cohen*, 1909, 2 Ch. 129.
(*d*) *Dorrell* v. *Dorrell*, 1895, 2 Ch. 698.
(*e*) 16 Hals. Laws of England, on pp. 371—2, citing *In re Ferneley's Trusts*, 1902, 1 Ch. 543.
(*f*) *Tullett* v. *Armstrong*, 1 Beav. 1.
(*g*) *In re Lumley*, 1896, 2 Ch. 690.

estate without power of anticipation, may anticipate the entirety (or any part) of her estate; but that immediately upon her marriage (No. 1), the separate estate, and with it the restraint on anticipation, attach and endure during that coverture, as regards any separate estate then remaining; and that upon her widowhood (No. 1) both the separate estate and the restraint disattach; and again, upon her subsequent marriage (No. 2), and subsequent widowhood (No. 2); and so on *toties quoties*, attaching and dis-attaching and re-attaching and again dis-attaching, according as she is covert or not from time to time and for the time being.

Funds in Court,—when and when not paid out to married woman on her receipt.

When the fund is in Court, and the married woman applies for the payment out of that fund, the Court has to inquire,—Whether the restraint is still a continuing restraint or not: And, Firstly, if the restraint is not a continuing one, the fund will be paid out to the woman on her separate receipt (*h*),—or to her attorney duly authorised (*i*): But, Secondly, if the contract is a continuing restraint (as *e.g.*, if the testator has said that his trustees are *to hold* the fund for the married woman), the fund will not be paid out (*k*),—and that, whether the fund is an income-bearing one or not (*l*). But if the life estate of the married woman is for her separate use, and she is entitled also to the absolute reversion in the fund but not for her separate use, the fund will not be paid out,—because (in such a case) there is no coalescence of the two interests (*m*): But if the coalescence has once happened, then, although it should have afterwards ceased, the fund will be paid out (*n*). However, the Court will not do anything by way of aiding the coalescence of the two interests (*o*).

What words will restrain alienation,—*Field* v. *Evans*.

No particular form of words is necessary to create the restraint on anticipation; and where the trustee of settled

(*h*) *In re Bankes*, 1902, 2 Ch. 333.
(*i*) *Stewart* v. *Fletcher*, 38 Ch. D. 627.
(*k*) *Acason* v. *Greenwood*, 34 Ch. Div. 712.
(*l*) *In re Tippett and Newbould*, 37 Ch. D. 444.
(*m*) *Whittle* v. *Henning*, 2 Phil. 731.
(*n*) *Plowden* v. *Gayford*, 39 Ch. D. 622.
(*o*) *Harrison* v. *Harrison*, 40 Ch. D. 418.

property was directed to receive (during the lady's life) the income "*when and as it became due,*" and to pay it to her for her separate use; and it was expressed, that her receipts (*after the income should have become due*) should be valid discharges for it,—She was held to be restrained from anticipating the income (*p*). And, on the other hand, where a testator bequeathed a sum of stock in trust for the separate use of his wife for her life, and directed that it "should remain (during her life) and be (under the order of the trustees) made a duly administered provision for her, and the interest given to her, *on her personal appearance and receipt,*"—It was held, that the widow (who had married again) was not restrained from alienating her interest in the stock (*q*),—Because, generally, where expressions are used giving the wife a right to receive separate property "with her own hands from time to time,"—or so that her receipts "alone for what shall be actually" paid into her own proper hands shall "be good discharges,"—these expressions are only an "*unfolding*" of what is implied in the separate use (*r*), and do not suggest any restraint on anticipation.

What words will not restrain alienation,—*Parkes* v. *White.*

Inasmuch as a married woman has (when discovert) the full power of alienation over her separate estate,—*even where it is coupled with the restraint on anticipation,*—The question sometimes arises, whether she has not (by her intervening acts before coverture or during a discoverture) acquired the property unfettered with the restraint: And where stock was bequeathed to a woman for her separate use without power of anticipation,—*the bequest being to the woman direct, and not to a trustee for her;* and she (being discovert) sold the stock, spent a portion of the proceeds, and invested the rest in shares and in bonds,—It was held, that (by so doing) she had determined the separate use, and with it the restraint on anticipation (*s*),—So that the administrator of the husband became entitled to the whole fund (although the wife survived): But, *now,* if the married woman should

In what cases the trust would have been wholly destroyed,—so as not to attach on marriage.

(*p*) *Bland* v. *Dawes*, 17 Ch. Div. 794.
(*q*) *In re Ross's Trusts*, 1 Sim. N. S. 176.
(*r*) *Parkes* v. *White*, 11 Ves. 222.
(*s*) *Wright* v. *Wright*, 2 J. & H. 647.

(before coverture or during a discoverture) make any such disposition of the *corpus* or capital of her separate estate,—and should afterwards marry or re-marry,—her remaining property will, *semble*, become her separate estate again, by virtue of the Married Women's Property Act, 1882. And it is convenient to mention here, that if a married woman (restrained from anticipation) purports to bar her estate-tail (and to limit the fee simple to herself), she may well do that (*t*), the disentailing deed being a mere re-creation of her *old* estate (*u*), discharged of the fetters of the entail.

Court of Equity could not dispense with the fetter on alienation;

Even a Court of Equity could not (apart from statute) have dispensed with the restraint on anticipation: Therefore, where a testator gave a legacy to a married woman, upon the express condition that she should (within twelve months) execute a certain conveyance of her separate estate (which was subject to the restraint against anticipation),—It was held, that the Court had no power to release the property from that restraint, even though it was for the married woman's benefit to have done so (*x*). But under the specific provisions of an Act of Parliament, the Court might have released the restraint for the purposes of the Act; and, under the Conveyancing Act, 1881, s. 39, the Court may,—if it thinks fit, but not otherwise (*y*), and if it is made to appear to be for the benefit of the married woman, and if she consent,—now lift off the restraint, either in whole or in part (*z*), or subject to any conditions it thinks fit (*a*): And the Court may, accordingly, now lift off the restraint,—for the purpose of effecting some particular mortgage or other definite disposition of her property (*b*), or for the purpose of some compromise (*c*); and if (in such a case) the money or fund (so released of the restraint) is applied in payment of the

Secus, now,—Under Conveyancing Act, 1881;

(*t*) *Cooper* v. *Macdonald*, 7 Ch. Div. 288.
(*u*) *Martin* d. *Tregonwell* v. *Strahan*, 4 Bro. P. C. 486.
(*x*) *Smith* v. *Lucas*, 18 Ch. Div. 531.
(*y*) *In re Pollard's Settlement*, 1896, 2 Ch. 552.
(*z*) *Hodges* v. *Hodges*, 20 Ch. Div. 749.
(*a*) *In re Milner's Settlement*, 1891, 3 Ch. 547.
(*b*) *In re Warren's Settlement*, 52 L. J. N. S. Ch. 928.
(*c*) *Boyer* v. *Maclean*, 1903, 1 Ch. 848.

debts of the husband, the wife is not entitled to recoupment by or to any indemnity from the husband (*d*).

And under Married Women's Property Act, 1893, and Trustee Act, 1893.

Also, now, by the Married Women's Property Act, 1893, s. 2, the Court may order to be paid (out of separate estate subject to the restraint) the costs payable by a married woman of her vexatious litigation (*e*); and by the Trustee Act, 1893, s. 45, the Court may impound separate estate (subject to such restraint), in order to make good a loss occasioned to the trust estate by the married woman's breach of trust: But the Court will not readily remove the restraint for either of these two purposes (*f*), —*Scil.*, because it is the duty of the trustees (and also of the Court) to protect the married woman against herself. Also, any special Act of Parliament (enabling the Court to interfere with the restraint on anticipation) must apparently specifically so provide: For example, the Matrimonial Causes Act, 1884 (*g*), which contains no such specific provision, does not (by its mere general provisions, enabling the Court to assign an allowance to the husband in lieu of enforcing by attachment a decree for the restitution of his conjugal rights), enable the Court to interfere with any separate property which is subject to the restraint (*h*). But, in a variation of the settlement, that Court may, *semble*, discharge the restraint (*i*).

***Arrears* of separate estate,— liability of.**

As regards the "*arrears*" of separate estate (restrained from anticipation), it appears to be now settled (*k*), that a judgment obtained against a married woman may be enforced against arrears accrued due *at or before* the date of the judgment (although they have not yet come into her actual possession); but that arrears accruing due *after* the judgment cannot be got at by the judgment creditor (*l*),—any more than they can be got at by the

(*d*) *Paget* v. *Paget*, 1898, 1 Ch. 47, 470.
(*e*) *Pawley* v. *Pawley*, 1905, 1 Ch. 593.
(*f*) *Bolton* v. *Curre*, 1895, 1 Ch. 544.
(*g*) 47 & 48 Vict. c. 68.
(*h*) *Michell* v. *Michell*, 1891, P. 208.
(*i*) *Churchward* v. *Churchward*, 1910, P. 195.
(*k*) *Hood-Barrs* v. *Heriot*, 1896, A. C. 174.
(*l*) *Bolitho* v. *Gidley*, 1905, A. C. 98.

voluntary alienee of such separate estate (*m*), every prospective voluntary charge (equally with every prospective charging order) being equally void (*n*); and a judgment against the married woman when a widow, *if the judgment be obtained on a contract entered into during the coverture,* is, now, on the same footing exactly (*o*).

Sub-sect. 2.—*The Effects of Recent Legislation.*

20 & 21 Vict. c. 85, s. 21.—separate estate under.

(1) Desertion.

Under the 20 & 21 Vict. c. 85 (Divorce Act), s. 21,—as amended by the 21 & 22 Vict. c. 108, s. 8,—if a wife is "*deserted*" (*p*) by her husband, she may obtain (as regards her property) a protection order against her husband and his creditors,—and (in case of the subsequent cohabitation of the husband and wife) the property will (under such order) be held for her separate use (*q*); but she still continues, of course, a married woman after the making of such protection order (equally as she would continue a married woman after a *voluntary* separation (*r*)), and her general separate estate (with or without the restraint on anticipation) also continues (*s*). Also, by the 20 & 21 Vict. c. 85, s. 25, if a married woman is "*judicially separated,*" she is to be deemed a *feme sole* as regards her property acquired *subsequently* to the judicial separation (*t*). And as well in the case of a protection order as also in the case of a judicial separation, the married woman will be liable (on her contracts *subsequent*), as if she were a *feme sole* (*u*); and her husband will not be liable at all for her *torts* subsequent (*x*).

(2) Judicial separation.

(*m*) *Stanley* v. *Stanley*, 7 Ch. Div. 589.
(*n*) *Ellis* v. *Johnson*, 31 Ch. D. 532.
(*o*) *Brown* v. *Dimbleby*, 1904, 1 K. B. 28.
(*p*) *Failes* v. *Failes*, 1906, P. 326.
(*q*) *Nicholson* v. *Drury Buildings*, 7 Ch. Div. 48.
(*r*) *St. John* v. *St. John*, 11 Ves. 525; *Mackenzie* v. *Edwards-Moss*, 1911, 1 Ch. 578.
(*s*) *Hill* v. *Cooper*, 1893, 2 Q. B. 85.
(*t*) *Dawes* v. *Creyke*, 30 Ch. Div. 500; *Waite* v. *Morland*, 38 Ch. Div. 135.
(*u*) *Brandon* v. *Hughes*, 1898, 1 Ch. 529.
(*x*) *Earle* v. *Kingscote*, 1900, 2 Ch. 585.

Variation of settlement.

The effect of an actual "*divorce*" (or of a decree of "*nullity*") is, of course, to make the woman a *feme sole;* and, in such a case, Firstly, her "*settled*" property may be dealt with by a variation of the settlement (*y*); and, Secondly, her "*unsettled*" property may be diversely settled (*z*): And the Court interposes in that way between the spouses, whether the husband (*a*) or the wife (*b*) is the offender, but not, *semble*, where both are offenders (*c*), —nor after the death of either of them where there are no children (*d*). And the principle on which the Court proceeds, in all such cases, is this, namely,—to secure (as far as possible) to the innocent party (and to his or her children) all the like advantages from the property which they might have reasonably expected from it, if the marriage relation had not been interrupted (*e*),—and the variation may therefore be made to extend (*e.g.*) to depriving the offending husband of any share in the settled property which he may have taken as administrator of a deceased child of the marriage (*f*).

41 Vict. c. 19, s. 4,—separate estate under.

Under the 41 Vict. c. 19 (Matrimonial Causes Act, 1878), s. 4, if a husband was convicted, summarily or otherwise, of an aggravated assault (within the meaning of the statute 24 & 25 Vict. c. 100, s. 43), the magistrate before whom he was so convicted, if satisfied that the future safety of the wife was in peril, might have ordered that the wife should be no longer bound to cohabit with her husband (*g*),—and might (at the same time (*h*)) have ordered the husband to pay his wife a weekly sum; and

49 & 50 Vict. c. 52,—separate maintenance under.

under the 49 & 50 Vict. c. 52 (Married Women's Maintenance in Case of Desertion Act, 1886), a married woman deserted by her husband (*i*) might have summoned

(*y*) *Allcard* v. *Walker*, 1896. 2 Ch. 369.
(*z*) *Lorriman* v. *Lorriman*, 1908, P. 282.
(*a*) *Smith* v. *Smith*, 12 P. Div. 102.
(*b*) *Midwinter* v. *Midwinter*, 1893, P. 93.
(*c*) *Constantinidi* v. *Constantinidi*, 1905, P. 253.
(*d*) *Thomson* v. *Thomson*, 1896, P. 263.
(*e*) *Hartopp* v. *Hartopp*, 1896, P. 65.
(*f*) *Blood* v. *Blood*, 1902, P. 78.
(*g*) *Wood* v. *Wood*, 10 Prob. Div. 172.
(*h*) *Woodhead* v. *Woodhead*, 1895, P. 343.
(*i*) *Reg.* v. *Leresche*, 1891, 2 Q. B. 418.

him before a magistrate, and the magistrate might have ordered him to pay her a weekly sum (not exceeding two pounds) proportioned to his means and to the destitution of the wife,—the magistrate's order being made enforceable as an affiliation order:

58 & 59 Vict. c. 39,—separate maintenance under.

Both which Acts have now been repealed,—so far as their provisions are above stated,—by the Summary Jurisdiction (Married Women) Act, 1895 (*k*); and it has now been provided, by the repealing Act, as follows, that is to say:—That upon such conviction of the husband as aforesaid,—and also in case the husband shall desert his wife (*l*),—and also in case of *persistent cruelty* by the husband (or of wilful neglect by him to provide reasonable maintenance for her and the children, whereby she is driven into leaving him and living apart from him), —The Court of summary jurisdiction (or, in case of conviction on indictment, the High Court) may order, that the wife shall be no longer bound to cohabit with the husband, and that the husband do pay to the wife a weekly allowance not exceeding two pounds (enforceable as an affiliation order),—Which weekly allowance may also afterwards be either increased or diminished, or wholly discharged,—and will be, *ipso facto*, discharged, in case the wife voluntarily resumes cohabitation with the husband (*m*), or commits adultery (*n*): And, on these provisions of this statute, it has been held, that the order of the Court has all the effect of a "*judicial separation*" (as regards the future status of the wife); that the cohabitation which is broken off need not have been continuous (*o*); that proof of means must be given before any allowance will be made (*p*); and that the application for the order must be made within six months of the act entitling the wife to make the application,—desertion being, however, deemed a *continuing* act (*q*), although cruelty (or wilful neglect) is not so (*r*). The order

(*k*) 58 & 59 Vict. c. 39.
(*l*) *Dodd* v. *Dodd*, 1906, P. 189.
(*m*) *Haddon* v. *Haddon*, 18 Q. B. D. 778.
(*n*) *Ruther* v. *Ruther*, 1903, 2 K. B. 270.
(*o*) *Bradshaw* v. *Bradshaw*, 1897, P. 24.
(*p*) *Earnshaw* v. *Earnshaw*, 1896, P. 160.
(*q*) *Heard* v. *Heard*, 1896, P. 188.
(*r*) *Ellis* v. *Ellis*, 1896, P. 251.

(where it is made by the justices) is appealable to the Divorce Division (on any matter of *law*),—but the justices need not (for that purpose) state a case, it being sufficient if the justices' clerk supply a note of the case to the Court, showing the *grounds* for making the order (*s*). It is to be observed, however, that there can be no "*desertion*," where there is a subsisting separation deed (*t*); and the desertion may otherwise be excusable,—and so not count (*u*); and it is also to be observed, that for "*habitual drunkenness*" in either of the spouses, the other is exempted from the duty of cohabiting with him or with her (*x*). Also, "*condonation*" on the wife's part wholly defeats her rights under the Act (*y*).

Married Women's Property Act, 1870,—separate estate under.

Under the Married Women's Property Act, 1870 (*z*), which came into force the 9th day of August, 1870, it was enacted (briefly) as follows:—

By s. 1, that the wages and earnings of any married woman, acquired or gained by her separately from her husband (and *all investments* of such wages and earnings) should be her separate property;

By s. 7, that where any woman, *married after the passing of the Act*, should during her marriage become entitled to any personal property as next of kin of an intestate, or to any sum of money (not exceeding £200) under any deed or will, such property should be her separate property;

And by s. 8, that where any freehold copyhold or customary-hold property should *descend* upon any woman married *after the passing of the Act*, the rents and profits of such property should be her separate property (*a*),—*Scil.*, for her life only (*b*): Also, by s. 12 of the Act, a husband was exempted from all liability for the debts of his wife contracted *before* marriage,—the wife being made exclusively liable therefor, to the extent of her

Extent of husband's liability for debts, under Married

(*s*) *Cobb* v. *Cobb*, 1900, P. 145.
(*t*) *Piper* v. *Piper*, 1902, P. 198.
(*u*) *Frowd* v. *Frowd*, 1904, P. 177.
(*x*) Licensing Act, 1902 (2 Edw. VII. c. 28), s. 5.
(*y*) *Williams* v. *Williams*, 1904, P. 145.
(*z*) 33 & 34 Vict. c. 93.
(*a*) *King* v. *Voss*, 13 Ch. Div. 504.
(*b*) *Toovey* v. *Turner*, 1907, 1 Ch. 475.

separate property; but that exemption of the husband proving mischievous, therefore, by the Married Women's Property Act, 1874 (*c*), which came into force the 30th day of July, 1874, the husband and wife might again have been jointly sued for any debts of the wife contracted *before* the marriage,—and the husband was again made liable therefor, but to the extent only of the assets (of the wife) in the Act specified (the onus being on the husband to show no such assets (*d*)).

Women's Property Amendment Act, 1874.

Under the Married Women's Property Act, 1882 (*e*), —which came into operation on the 1st day of January, 1883 (s. 25), but which has of course no operation out of the jurisdiction,—it is provided (in substance) as follows:—

Married Women's Property Act, 1882,—separate estate under.

By s. 2, every woman marrying *on* or *after* the 1st day of January, 1883, shall hold as her separate property all real and personal estate which shall either belong to her at the time of the marriage, or which shall come to her after the marriage (including the wages and earnings of any separate employment,—and the gains of any literary, artistic, or scientific skill,—carried on or exercised by her separately from her husband); and, by s. 5, every woman married *before* the 1st day of January, 1883, shall hold as her separate property all real and personal estate, "her *title* to which (whether vested or contingent and whether in possession, reversion, or remainder (*f*)), shall accrue" on or after the 1st day of January, 1883 (including such wages, earnings, and gains as aforesaid): It is to be noted, however, that a mere *spes successionis* is not considered as a "*title accrued*" within the meaning of this section (for the purposes of the section (*g*)); and further, that the title which accrues upon the exercise of a power of appointment (whether general or special) is deemed in law to have accrued,—as from the date of the operation of the appointment (and not as from the date of the instrument giving the

What property is to be separate,—

(1) In case of marriage on or after 1st January, 1883.

(2) In case of marriage before that date.

Title, accrual of,—under powers, &c.

(*c*) 37 & 38 Vict. c. 50.
(*d*) *Matthews* v. *Whittle*, 13 Ch. D. 811.
(*e*) 45 & 46 Vict. c. 75.
(*f*) *Reid* v. *Reid*, 31 Ch. Div. 402.
(*g*) *Stockley* v. *Parsons*, 45 Ch. Div. 51.

power (*h*)), the prior accrued interest being "*defeated*" by the exercise of the power (*i*). And it is convenient to also note here,—as regards covenants to settle property,—that if the covenant is to settle a fee simple remainder expectant on an estate tail; and the estate tail is barred, and the resultant fee simple descends upon (or comes to) the covenantor,—the fee simple estate (so descending upon him) is not the *old* fee simple remainder (which has been extinguished),—and therefore is not caught by the covenant (*k*): *Secus*, where the old title remains, only bettered (*l*).

Deposits, consols, Government annuities, stocks, shares, &c. (1) When to be separate property.

By ss. 6 and 7,—All deposits in post-office or other saving-banks (or in any other banks), and all consols, &c. &c., on or after the 1st day of January, 1883, standing in the sole name of a married woman,—or (by s. 8) in her name jointly with any other person (other than her husband),—are to be deemed her separate property,—*Scil.*, until the contrary is shown; and the liability (if any) attaching thereto is to be incident to the married woman's separate estate only (s. 9); but no corporation or company is (merely by the Act) either obliged or authorised to accept or admit a married woman as a holder of its stock or shares (s. 7). Also, any of the aforesaid investments which have been made with the husband's moneys and without his consent, are to remain the husband's property,—and if made in fraud of the husband's creditors, are void as against his creditors (s. 10).

(2) When not to be separate property.

Married woman, having separate estate, may contract, and incur liabilities like a man;

By s. 1, sub-ss. 2, 3, and 4, provided only she had separate estate at the time (*m*),—and it was separate estate which she might reasonably be deemed to contract with reference to (*n*),—a married woman was rendered capable of contracting,—and of contracting even with her husband (*o*),—so as to bind her separate estate; and every

(*h*) *In re Vizard's Trusts*, L. R. 1 Ch. App. 588.
(*i*) *Lovett* v. *Lovett*, 1898, 1 Ch. 82.
(*k*) *Smith* v. *Osborne*, 6 H. L. Ca. 375.
(*l*) *Noel* v. *Bewlay*, 3 Sim. 103.
(*m*) *Palliser* v. *Gurney*, 19 Q. B. D. 519.
(*n*) *Harrison* v. *Harrison*, 13 Prob. Div. 180.
(*o*) *Butler* v. *Butler*, 16 Q. B. D. 374.

contract entered into by her was to be *primâ facie* considered a contract entered into by her in respect of her separate estate: And, now, by the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 1, every contract which after the 5th December, 1893, is entered into by a married woman (otherwise than as her husband's agent (*p*)) is a contract binding on her separate estate, *whether she has or has not any such estate at the date of the contract*; and the contract binds all her separate estate, *whether then present or future*, and all property which she thereafter (*while discovert*) is entitled to (*q*).

and may make a will,—like a man;

By s. 1, sub-s. 1, of the Act of 1882, a married woman might also have made a will; but her will (made during coverture) operated only on the separate estate which she *then* was (or afterwards *during the coverture* became) possessed of or entitled to,—and required therefore to be re-executed by her when she became discovert, if it was to dispose of property acquired *after* the coverture had come to an end (*r*). But, now, by the Act of 1893, s. 3, the will of a married woman (made during coverture) is to be construed, with reference to the real and personal estate comprised in it, as speaking and taking effect from the death of the testatrix, equally as (under s. 24 of the 1 Vict. c. 26) the will of a man would be construed; and words of appointment may (for this purpose) be construed as words of bequest (*s*). Also, the testatrix need not have any separate estate at the date of making her will; and she need not re-execute her will, after she is left a widow; and all these provisions apply to the wills of married women who shall die after the 5th December, 1893 (*t*). But, *nota bene*, where any specific disability has been imposed (by special Act) on a married woman's power of devise or of bequest, that specific disability continues notwithstanding these provisions (*u*): *Secus*, where

and her will now operates exactly like the will of a man.

(*p*) *Paquin* v. *Beauclerk*, 1906, A. C. 148.
(*q*) *Softlaw* v. *Welch*, 1899, 2 Q. B. 419.
(*r*) *Cuno* v. *Mansfield*, 43 Ch. Div. 12.
(*s*) *In re James*, *Hole* v. *Bethune*, 1910, 1 Ch. 157.
(*t*) *In re Wylie*, 1895, 2 Ch. 116.
(*u*) *Clements* v. *Ward*, 35 Ch. Div. 589.

there has been a subsequent special statute dealing specifically with the disability (*x*).

Married woman may sue and be sued alone;

By s. 1, sub-s. 2, of the Act of 1882, a married woman may now sue or be sued either in contract or in tort,—as if she were a *feme sole*, and without her husband being joined either as a co-plaintiff or as a co-defendant with her; and the costs and damages recovered by or against her, go to increase or (as the case may be) to diminish her separate estate,—and are accordingly liable to be attached under a garnishee order (*y*). And, by s. 1, sub-s. 5, if (but only if) she carries on (or has carried on (*z*)) any trade separately from her husband, she is (in respect of her separate property, and the debts incurred in such trade) liable to the bankruptcy laws (*a*). And all these liabilities of a married woman (on her contracts entered into *subsequently* to the Act), extend as well to her separate estate as also (by s. 4) to any property subject to a general power of appointment which she may have exercised by her will. But her appointment property (being property over which she has a general power of appointment, and which power she has *not* exercised) will not be liable in the event of her bankruptcy (*b*). Also, a committal order cannot be made against a married woman, even if she be proved to have had (or to have) the means to pay (*c*),—Unless in respect of debts (*e.g.*, poor rates) the recovery of which is (by statute) made specifically enforceable by committal (*d*). An attachment may, however, issue against a married woman, *to enforce payment into Court* (*e*).

and, being a trader, may be made a bankrupt.

Cannot be compelled to exercise, being bankrupt, her general powers,—

and cannot be committed.

Her claim as a creditor of her own husband, being a bankrupt.

By s. 3 of the Act of 1882, if the married woman lends or entrusts any separate property to her husband,—*Scil.*, in connection with his trade, and not otherwise (*f*),—and

(*x*) *Douglas* v. *Simpson*, 1905, 1 Ch. 279.
(*y*) *Holtby* v. *Hodgson*, 24 Q. B. D. 103.
(*z*) *In re Worsley*, 1900, 1 Q. B. 309.
(*a*) *Ex parte Lester*, 1893, 2 Q. B. 113.
(*b*) *Ex parte Gilchrist*, 17 Q. B D. 521.
(*c*) *Draycott* v. *Harrison*, 17 Q. B. D. 147.
(*d*) *In re Elizabeth Allen*, 1894, 2 Q. B. 924.
(*e*) *Turnbull* v. *Nicholas*, 1900, 1 Ch. 180.
(*f*) *In re Clarke*, 1898, 2 Q. B. 330.

he becomes bankrupt, or dies insolvent (*g*),—The separate property is to be treated as assets of the husband, and the wife is (in such case) to have only a right of proof against her husband's estate as a creditor for it, and her right of proof is *posterior* to the claims of the other creditors of the husband (*h*). But that provision does not interfere with the wife's right of "*retainer*" (*where she is entitled to such right* (*i*)); nor is it applicable to a loan made by a married woman to a firm in which her husband is a partner (*k*); nor does it invalidate any "*security*" the wife may have taken (*l*), or her right as a surety, where (as surety for her husband) she has mortgaged her estate (*m*).

Her position as an executrix or administratrix.

By s. 24 of the Act of 1882, the word "contract" is to include (for the purposes of the Act) the "*acceptance*" of any trust (or of the office of executrix or administratrix),—So that the liability of the separate estate now extends to any breach or trust (or devastavit) committed by such married woman,—and whether before or after her marriage,—and her husband (provided he have not intermeddled) is not now to be liable therefor: All which is an entire inversion (and repeal) of the old law,—For (by the old law) the husband of a married woman (who was a trustee or an executrix or administratrix) was liable (*n*),—and she herself (in respect of her separate estate) was not liable (*o*),—for her breaches of trust (and devastavits). But a husband still remains liable for his wife's other torts,—*Scil.*, where (and only where) he used to be liable for them (*p*),—as, for example, his wife's frauds (*q*), libels (*r*), &c. And, *nota bene*, the action is against the husband and wife, and abates on the wife's death (*s*),—or on her judicial separation (*t*).

(*g*) *Tarn* v. *Emmerson*, 1895, 1 Ch. 652.
(*h*) *Ex parte District Bank*, 16 Q. B. D. 700.
(*i*) *Woodhead* v. *Ambler*, 1905, 1 Ch. 697.
(*k*) *Ex parte Nottingham*, 19 Q. B. D. 88.
(*l*) *Ex parte Shiel*, 4 Ch. Div. 789.
(*m*) *Ex parte Cronmire*, 1901, 1 Q. B. 480.
(*n*) *Bolinghroke* v. *Ker*, L. R. 1 Exch. 222.
(*o*) *Wainford* v. *Heil*, L. R. 20 Eq. 321.
(*p*) *In re Beauchamp*, 1904, 1 K. B. 572.
(*q*) *Earle* v. *Kingscote*, 1900, 2 Ch. 585.
(*r*) *Beaumont* v. *Kaye*, 1904, 1 K. B. 292.
(*s*) *Capel* v. *Powell*, 17 C. B. N. S. 743.
(*t*) *Cuenod* v. *Leslie*, 1909, 1 K. B. 880.

Executor *de son tort.*

And here it is to be noted, as regards the "*acceptance*" of an executorship or trust, that an executor who administers before obtaining probate, is regarded simply as an executor *de son tort*,—and he (and also his estate) is liable accordingly; and any company which (before probate) pays to such an executor any dividends on the shares of the deceased, is also an executor *de son tort* (*u*),—Because, generally, any one acting under an executor who cannot show the probate, is liable as an executor *de son tort*; and the mere circumstance, that (by reason of the death of the executor) probate is never obtained by him, although he intended to obtain it, is no excuse, either to the company or to other the person aforesaid (*x*); but the probate (subsequently obtained) cures anything that was merely *informal* before, on being ratified by the duly constituted legal personal representative (*y*).

Wife's acknowledged deed, formerly required for trust real estate,—but no longer required.

By s. 18 of the Act of 1882, a married woman, who is an executrix administratrix or trustee, is to be regarded as a *feme sole*,—So that her husband need not *now* be a party to the administration bond given by his wife (*z*): And seeing that the married woman is competent (of herself alone) to execute the trust,—it followed, that the wife's deed conveying the trust property (whether real estate or personal estate) was good without acknowledgment, and therefore without her husband's concurrence in such deed,—*Scil.*, Because, if he concurred, he would be a *co-conveying* party, and (*ex hypothesi*) he had no estate or interest to convey; and that view (after a pitiful succession of decisions to the contrary (*a*)) has now been declared by statute (*b*) to be the correct view.

Ante-nuptial debts, &c.,—wife liable for; and husband liable

By s. 13 of the Act of 1882, as regards all debts contracted (or liabilities incurred), and all contracts (or torts) entered into (or committed), by a married woman *before*

(*u*) *The New York Breweries case*, 1898, 1 Q. B. 205.
(*x*) *Sharland* v. *Mi'don*, 5 Ha. 469.
(*y*) *In re Watson*, 18 Q. B. D 116.
(*z*) *Re Harriet Ayres*, 8 Prob. Div. 168.
(*a*) *In re Harkness and Allsopp*, 1896, 2 Ch. 358; *In re West and Hardy*, 1904, 1 Ch. 145.
(*b*) 7 Edw. VII. c. 18, s. 1.

her marriage,—she is to continue liable (in respect of and to the extent of her separate property) for all sums recovered against her, and also for all the costs of suit: And, by s. 14, her husband also continues liable therefor, *but not further or otherwise than to the extent of the property (belonging to his wife) which he shall have acquired (or become entitled to) from or through his wife,* —after deducting any payments already made by him (and any sum for which judgment may have been already recovered against him), in respect of any such debts liabilities contracts or torts: And (as between the husband and wife) the separate estate is, *primâ facie*, to be deemed primarily liable therefor (s. 13). Accordingly, the plaintiff may sue both husband and wife,—jointly or solely (s. 15); and the judgment is a *personal* judgment against the husband to the extent of his liability, and a *proprietary* judgment against the wife to the extent of her separate property (*c*).

concurrently, to what extent?

By s. 12 of the Act of 1882, every married woman (in respect of her separate property) may, in her own name pursue, against her husband and also against third parties, all civil remedies (*d*) for the protection and security of her separate property,—giving also (if required by the exigencies of the suit) an undertaking in damages (*e*); and she may also pursue any criminal remedies that may be applicable. But, as regards criminal proceedings, these are not to lie by the wife against her husband, while they are living together (nor in respect of any act done by the husband, while they were living together, and he was not on the point of deserting her); and (subject to that) he may prosecute her, being the offender (*f*),—wherever she might prosecute him, being the offender (s. 16); and in all such criminal proceedings, the wife may give evidence against the husband, and (under the Married Women's Property Act, 1884 (*g*)), the husband against the wife. But, ex-

Remedies (civil and criminal) of married woman, for security and protection of separate estate.

(*c*) *Goatley* v. *Jones*, 1909, 1 Ch. 557.
(*d*) *Larner* v. *Larner*, 1905, 2 K. B. 539.
(*e*) *Pike* v. *Cave*, 1893, W. N. p. 91.
(*f*) *Rex* v. *James*, 1902, 1 K. B. 540.
(*g*) 47 & 48 Vict. c. 14.

cepting as incident to the property of either, a wife may not sue her husband (or he her) for a tort (*h*).

Summary remedy, in case of disputes between husband and wife, regarding alleged separate property.

By s. 17, any question between husband and wife (regarding the wife's separate property, or what she alleges to be such) may, at the suit of either party,—or (in the case of stocks and shares) at the suit of the bank corporation or company, suing as a stakeholder only and not otherwise,—be settled without suit,—On an application (by summons or otherwise) to the High Court, or to the County Court (and, as regards the County Court, irrespectively of the amount or value of the property in question); and the Court may make such order or direct such inquiry as it thinks fit; and the order is appealable in the usual way; and the proceedings in the County Court may be removed into the High Court, when the value of the property in question is beyond the limit (irrespectively of the Act) of the County Court jurisdiction.

Wife's maintenance of pauper husband, and of her children and grandchildren, &c.

By s. 20 of the Act of 1882, a married woman (having separate estate) is liable to the guardians of the poor, to maintain her husband becoming chargeable to the parish; and by s. 21, is liable (but concurrently with her husband) to maintain her children and grandchildren also (*i*),—and also, *now*, her father or her mother (*k*).

Married woman's legal personal representative, —position of.

By s. 23, the legal personal representative of a married woman (having separate estate) has (in respect of such estate) the same rights and liabilities as the married woman if living would have.

Policies of life assurance, effected by married woman (or by her husband);

By s. 11 of the Act of 1882, a married woman having separate estate may effect a policy of assurance for her own separate use, and either on her own life or on that of her husband; and she may also insure her own life (as may also a husband his own life), expressly for the benefit of her (or his) husband (or wife),—with or without her (or his) child or children, or any of them; and for any

(*h*) *Reg.* v. *London (Lord Mayor)*, 16 Q. B. D. 772.
(*i*) *Bryant* v. *Hickley*, 1894, 1 Ch. 324.
(*k*) 8 Edw. VII. c. 27, s. 1.

such insurances, a pecuniary interest in the life assured need not be shown (*l*). And under any such insurance, a trust arises in favour of the objects in whose favour the insurance is expressed to be made,—and for the estates and interests therein expressed; and the policy moneys are not (unless upon a total failure of the objects of the trust) to form any part of the estate of the life insured, —Although, in the case of such total failure (*m*), these moneys would belong absolutely to the estate of the party (whether husband or wife) who had effected the insurance: But, either in the policy itself or by any memorandum under the hand of the party effecting the policy, a trustee may be appointed of the policy moneys; and (failing such appointment) the legal personal representative of the life insured is made the trustee (*n*),—or the Court will (if necessary) appoint a trustee. And it is to be here noted, that an after-taken wife may be (*o*),—and usually will be (*p*),—entitled to a share in the policy moneys; and the children of both the marriages will be entitled to share therein,—and the beneficiaries may be entitled as joint tenants (*q*).

and trusts of policy moneys.

By s. 19, the Act (of 1882), or anything therein, is not to interfere with (or to affect) any settlement (or agreement for a settlement) made (or to be made), whether before or after marriage, respecting the property of the married woman (*r*); but any settlement (or agreement for a settlement), made (or to be made) by a married woman of her property, is to be subject to all the same causes of invalidity, that the like settlement (if made by a man of his property) would be subject to,—at the suit of creditors impugning it as fraudulent (*s*): Also, the Act of 1882, or anything therein, is not to interfere with (or to render inoperative) any restraint on anticipation attached (or to be attached) to *corpus* or income,—excepting that any such restraint (created by the married

The Act is not to affect the provisions of settlements or of agreements for settlements,

or the restraint on anticipation.

(*l*) *Griffiths* v. *Fleming*, 1909, 1 K. B. 805.
(*m*) *Cleaver* v. *Mutual Reserve Association*, 1892, 1 Q. B. 147.
(*n*) *In re Kuyper's Policy Trusts*, 1899, 1 Ch. 38.
(*o*) *In re Griffith's Policy*, 1903, 1 Ch. 739.
(*p*) *In re Browne's Policy*, 1903, 1 Ch. 188.
(*q*) *In re Davies' Policy*, 1892, 1 Ch. 90.
(*r*) *Buckland* v. *Buckland*, 1900, 2 Ch. 534.
(*s*) *Jay* v. *Robinson*, 25 Ch. D. 467.

woman herself on her own property,—but not, of course, when created by any third person or by her husband (*t*), —is to be invalid as against her creditors before marriage.

Legislation,—general effect of.

The effect of the Married Women's Property Acts, 1882 and 1893, is to make a separate entity of the wife,—*so far as regards the beneficial real and personal estates of the wife* (*u*),—So that a wife may (in respect of her separate estate) plead the Statutes of Limitation against her husband even (*x*): Nevertheless, a gift to A. and B. and the wife of B. will still (in the general case) give A. one half and B. and B.'s wife one half; and B. and his wife will take such second half equally between them (*y*), —and as *joint*-tenants (*z*), having (formerly) taken as tenants by entireties (*a*).

Marriage with sister of deceased wife, —effect of, as regards then existing property rights.

By the statute 7 Edw. VII. c. 47,—which statute is, in its very words, retrospective,—the marriage of a man with his deceased wife's sister having been legalised as a *civil* marriage, the property rights of the female,—and, *semble*, also of the male,—as such rights existed when the so-called marriage was contracted,—remain unaffected; and, *e.g.*, as regards the female, if (at the date of her marriage with A.) she was the widow of B., and entitled under B.'s will to an estate for her life or widowhood, she will (although become the civil wife of A.) continue to be the lawful widow of B.,—and will remain entitled accordingly during the continuance of that widowhood (*b*): But, *nota bene*, as regards the title of anyone in expectancy,—where the expectancy is a mere "*bare expectancy*," as that of the next of kin to the personal estate of a man (or woman) who is still living,—that is not either property or a title to property (*Scil.*, within the Act, or at all (*c*)).

(*t*) *Birmingham Society* v. *Lane*, 1904, 1 K. B. 35.
(*u*) *Holtby* v. *Hodgson*, 24 Q. B. D. 103.
(*x*) *Hallett* v. *Hastings*, 35 Ch. D. 94.
(*y*) *Jupp* v. *Buckwell*, 39 Ch. Div. 148.
(*z*) *Thornley* v. *Thornley*, 1893, 2 Ch. 229.
(*a*) *Doe* d. *Truslove* v. *Parrott*, 5 T. R. 652.
(*b*) *In re Whitfield*, *Hill* v. *Mathie*, 1911, 1 Ch. 310.
(*c*) *In re Green*, *Green* v. *Meinall*, 1911, 2 Ch. 275.

Section II. Pin Money and Paraphernalia.

I. Pin Money is a yearly allowance settled upon the wife before marriage,—in order to dress agreeably to the tastes of her husband, and for his delectation generally; and gifts (from time to time) made by the husband to his wife *for that same purpose* are also pin money,—and are not separate estate of the wife.

Pin money, for wife's personal expenditure.

Where the pin money arises under a settlement, if the wife permits it to run into arrear, and she survive her husband, she can claim only one year's arrears,—and her executors have no claim at all,—for even one year's arrears (*e*): But where the wife has complained of her pin money being paid short, and the husband has promised her she will have it by-and-by, she is entitled to the whole of the arrears due at her husband's death (*f*): And, on the other hand, if the husband has paid for all the wife's apparel,—and has provided also for all her private expenses,—she cannot claim any arrears at all on the death of her husband (*g*). In the case of *Howard* v. *Digby* (*h*), the wife had been a lunatic (without any lucid interval) for forty years,—and so could not *consent* to her husband's retaining her pin money; and yet her executors were held not entitled to recover any of the arrears.

Not like her separate estate in some few respects, but like it in most respects.

II. Paraphernalia (*i*),—were the apparel and ornaments of the wife given to her or supplied for her by her husband, and to be worn by her (*k*) in maintenance of her station in life (*l*). But gifts of jewels might have been made to the wife for her separate use; and articles (such as would ordinarily have constituted paraphernalia), when given to the wife (either before or after marriage) by a relative, would have been considered, in general, as

Paraphernalia include gifts to be worn as ornaments; but not gifts by a stranger, before or after marriage;

(*e*) *Howard* v. *Digby*, 8 Bligh, N. S. 26.
(*f*) *Ridout* v. *Lewis*, 1 Atk. 269.
(*g*) *Thomas* v. *Bennet*, 1 P. W. 341.
(*h*) *Supra.*
(*i*) The word paraphernalia is derived from the Greek word παραφερνη,—Which signifies property "*over and above*" (παρα) the "*dowry*" (φερνη) which the wife brings to her husband.
(*k*) *Graham* v. *Londonderry*, 3 Atk. 394.
(*l*) *Jervoise* v. *Jervoise*, 17 Beav. 571.

nor old family jewels.

given to her for her separate use (*m*). Also, old family jewels did not constitute paraphernalia (*n*).

Wife cannot dispose of paraphernalia during husband's life. Husband cannot dispose of them by *will*.

A wife could not have disposed of her paraphernalia during her husband's lifetime; but the husband might have done so,—*Scil.*, by sale or gift *inter vivos* (but not by his will (*o*)); and they were liable for his debts (*p*).

On partial alienation by husband, must be redeemed out of the personal assets, as against legatees.

Where the husband died indebted, if the wife's paraphernalia were taken by his creditors in or towards satisfaction of their debts, the widow, in the administration of her late husband's estate, was preferred to the general legatees,—and entitled, therefore, to marshal the assets, in all those cases in which a general legatee would have had that right (*q*); and, in fact, the wife (as regards her paraphernalia) had the first claim after simple contract creditors. Also, if the husband should (during his life) have alienated the wife's paraphernalia by way of pledge or mortgage, the wife (surviving him) was entitled to have them redeemed out of his estate in preference to the pecuniary legatees.

Paraphernalia, area of, now much narrowed.

Since the Married Women's Property Act, 1882, whereby the area of the separate estate of the wife has been enlarged, the area of things to be called "*paraphernalia*" has been correspondingly narrowed: For it appears, that paraphernalia were merely an exception to the common law rule, that the wife's pure personal estate in possession vested (all of it) in the husband, on the marriage and by virtue merely of the marriage (*r*),—So that a wife being now, *semble*, entitled for her separate use to all her dresses, underwear, and jewellery, even when supplied by her husband, all these may accordingly now be taken in execution by a judgment creditor of the wife's, —although the husband should protest that they are *quodammodo* not hers, but his; and the old notion, that

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(*m*) *Lucas* v. *Lucas*, 1 Atk. 270.
(*n*) *Jervoise* v. *Jervoise*, *supra*.
(*o*) *Seymore* v. *Tresilian*, 3 Atk. 358.
(*p*) *Campion* v. *Cotton*, 17 Ves. 263.
(*q*) *Tipping* v. *Tipping*, 1 P. Wms. 729.
(*r*) *Masson* v. *De Fries*, 1909, 2 K. B. 831.

all such like articles were but the "*trappings*" of the wife, who was the chattel of her husband, and whom he merely decked for his own delectation, is (apparently) become barbarous and obsolete (*s*).

Section III. The Wife's Equity to a Settlement; also, Her Right of Survivorship

Marriage a gift of wife's personal property to husband,—both at law and in equity.

Marriage used to be,—and (subject to the various Married Women's Property Acts above mentioned) still is,—a gift to the husband of all the personal property (other than separate property) to which the wife is entitled at the time of the marriage, or to which she may afterwards become entitled: And no distinction exists, in this respect, between personal property to which the wife is entitled in equity and personal property to which she is entitled at law; and where the wife is entitled (as one of several co-owners) to an undivided share only, the law is the same,—*Scil.*, so far as regards her undivided share (*t*), —So that, subject only to the Acts aforesaid, all the wife's personal property (whether at law or in equity) becomes *primâ facie* the husband's; and equity (in compelling the husband to make a settlement of it on his wife) is interfering with his rights to it.

Wife's equity to a settlement does not depend on a right of property in her,—

but arises from the maxim, "He who seeks equity must do equity."

On what ground, then, is the interference of equity with the husband's rights to be supported? And it is safe to assert, that the wife's equity to a settlement did not (and does not) depend on any right of property in her, —For if she insists upon her equity, she must claim it for herself and her children (and not for herself alone). The wife's equity to a settlement was, in fact, a mere creature of equity,—and was an application of the maxim, "*He who seeks equity must do equity*,"—That is to say, the Court refused its aid to the plaintiff-husband seeking (in a Court of Equity) to acquire what the law entitled him to (but which no Court of law had jurisdiction to give him); and as he necessarily came into a Court of Equity

(*s*) *Masson* v. *De Fries*, *supra*.
(*t*) *Bracebridge* v. *Cook*, Plowd. 418.

for it, that Court obliged him to fall in with its own ways, —and never allowed a husband to obtain the fortune of his wife, *without he first made a provision for her thereout:* And once the principle was recognised where the husband was the plaintiff, it was easy to apply it also to cases where the assignees of a bankrupt (or insolvent) husband were the plaintiffs; and the rule was afterwards held to apply, even as against the particular assignee of the husband (for valuable consideration) where he was plaintiff (*u*); and, eventually, the wife herself was permitted to come (as a plaintiff) to assert her equity (*x*).

The general principle upon which the Court acts, in decreeing or not to married woman a settlement.

Before proceeding to any detailed consideration of the equity, it is convenient to state the principle which governs it: Now, there being, first of all, a possibility of the husband getting hold of *and keeping to himself* (by virtue of his legal rights) the property of the wife, the Court inquires, whether the wife (if she survive her husband) will take the entirety of the property (by virtue of her right of survivorship hereinafter explained); and if (but only if) there is a possibility of the husband *getting and keeping* the whole property, AND the wife will *not* be entitled to the entirety by survivorship, then the Court inquires into the question of the wife's equity to a settlement out of it: And (upon that inquiry) the Court inquires principally, whether the property is legal, or is equitable: And the Court answers :—(1) If the property is *equitable*, the wife is entitled to an equity out of it (there being no other sufficient reason for denying her the equity); but (2) If the property is *legal*, the wife is *not* entitled to any equity out of it (there being no other sufficient reason for decreeing to her the equity).

The general principle illustrated.— (1) Wife's term, or leasehold interest. (a) Being equitable.

(1) *The Wife's Leaseholds.*—Firstly, where the husband (and wife) assigned by way of mortgage (and by *unacknowledged deed*) the *equitable* interest of the wife (or of the husband in right of his wife) in a term of years, and the mortgagee filed his bill (against the hus-

(*u*) *Scott* v. *Spashett*, 2 Mac. & G. 596.
(*x*) *Elibank* v. *Montolieu*, 5 Ves. 737.

band, the wife, and the trustee) for a foreclosure and assignment of the term, the wife was held to be entitled to a provision for her life (by way of settlement) out of the mortgaged premises (*y*): But, Secondly, where a similar assignment took place of the wife's *legal* interest in leaseholds, the wife was held to have no equity to a settlement out of them, the mortgagee having taken a good legal title thereto from the husband alone (*z*). But, in a case of *Boxall* v. *Boxall* (*a*), where the leaseholds of the wife were legal, and the husband had deserted his wife, and she had sold the leaseholds,—*making title thereto through a* FRAUD *which purported to show, that she was a widow, and that the leaseholds had been her own separate estate;* and she had expended the whole purchase-money upon the maintenance of herself and her children,—The Court refused to recognise the husband's title at all, or to give him any relief at all against the *purchaser* of the leaseholds.

(b) Being legal.

(2) *The Wife's Pure Personal Property.*—There was no doubt at all, that if the property was *legal*, the wife had no equity out of this; but if that property was *equitable*, there was just as little doubt, that the wife had an equity out of it: Which equity, when the property belonged to the wife for the absolute estate or interest therein, held good not only as against the husband, but also as against everybody claiming under him (*b*). On the other hand, where the property belonged to the wife for her life only, the Court never (in the absence of misconduct on the part of the husband) deprived him of the income of the fund,—and therefore held, that the wife (even where her husband had deserted her (*c*), had failed to maintain her, or had become bankrupt (*d*)) was not entitled, *as against a purchaser for value of the life-estate*, to any provision out of her life-estate,—*Scil.*, where the purchaser had purchased

(2) Wife's pure personal property.
(a) Being legal.
(b) Being equitable,—
(aa) And interest being an absolute interest.
(bb) Interest being for life only.

(*y*) *Hanson* v. *Keating*, 4 Hare, 1.
(*z*) *Hill* v. *Edmonds*, 5 De G. & Sm. 603.
(*a*) 27 Ch. D. 220.
(*b*) *Tidd* v. *Lister*, 3 De G. M. & G. 869.
(*c*) *Wright* v. *Morley*, 11 Ves. 12.
(*d*) *Elliott* v. *Cordell*, 5 Mad. 149.

previously to the desertion or bankruptcy (*e*). But the husband's general assignee was not so favoured,—because, *when his title accrued, the incapacity of the husband to maintain his wife had already to his knowledge raised an equity in her favour,*—and she therefore was, in that case, entitled to have some provision made for her out of the life-estate,—but not out of any income accrued due before she claimed her equity (*f*).

(3) Wife's realty.
(a) Estate of inheritance.
(b) Life estate.

(3) *The Wife's Real Estate.*—In the case of realty of *inheritance,* the question of the wife's equity to a settlement out of it did not arise,—*Because there was no possibility of the husband either taking or* KEEPING *the inheritance adversely to his wife;* and, therefore, whether the estate was legal or was equitable, the wife had no equity, —*Scil.*, because she had something better (namely, the whole indefeasible inheritance, in fee simple or in fee tail, as the case might be (*g*)). And the question, therefore, only arose as regards the wife's life-estate (where she was entitled to a life-estate only),—or arose only as regards the rents and profits *during the coverture* (where the wife was entitled for an estate of inheritance in fee simple or in fee tail). Now, where the husband was an insolvent debtor, and his wife was entitled to certain lands for her life only, and for the *equitable* estate only therein,—the Court held, that the wife was entitled (as against the assignee in the insolvency) to have some provision made for her out of the accruing rents and profits (*h*): And, again, where the husband had abducted his wife (and had been imprisoned for the abduction), and his wife was the legal tenant in tail of certain lands,—but her legal title was subject to a jointure rent-charge, and to a term of years created for the purpose of securing that charge and ceasing with the charge,—The Court held, that *so long as the term lasted* (whereby the wife's estate tail, although good enough in equity, was not perfectly good at law) the wife was entitled, as against her husband

(*e*) *Vaughan* v. *Buck*, 13 Sim. 404.
(*f*) *Re Carr's Trusts*, L. R. 12 Eq. 609.
(*g*) *Life Association of Scotland* v. *Siddall*, 3 De G. F. & J. 271.
(*h*) *Sturgis* v. *Champneys*, 5 My. & Cr. 97.

(and his creditors), to have some provision made for her out of the accruing rents,—although not after the term should have ceased (if it should, in fact, cease) during the coverture (*i*).

A wife might, by alienation, have defeated her equity to a settlement: And, Firstly, as regards her freehold estates, whether in possession or in reversion (*k*), she might have alienated these,—by a deed duly acknowledged by her, and executed (with the concurrence of her husband) in the manner provided by the 3 & 4 Will. IV. c. 74: Secondly, as regards her copyhold estates, she might have alienated these,—by a surrender thereof, being separately examined, and her husband concurring, of course: And, Thirdly, as regards her personal estates (whether leaseholds or pure personal estate), her husband might solely have disposed of all these,—subject only to the wife's establishing (if she was able to) her equity to a settlement out of them: But, Fourthly, as regards the wife's choses in action (or pure personal estate outstanding), the old common law said, that the marriage was only a qualified gift of these to the husband,—That is to say, a gift to him, *only if* (*or upon condition that*) *he reduced them into possession during* (*in effect*) *his life*,—So that, if he died before his wife without having reduced such property into possession, the wife (by right of survivorship) remained entitled to the property.

Wife's equity defeated by her alienation.
(1) Interests in realty.
(a) Freeholds.
(b) Copyholds.
(2) Interests in personalty.
(a) In possession.
(b) In reversion, or outstanding.

Accordingly, where a husband and wife (by deed executed by both) purported to assign to a purchaser for valuable consideration a fund in which the wife had a vested estate in remainder, expectant on the death of a tenant for life,—*and both the wife and the tenant for life outlived the husband*,—It was held, that the wife (notwithstanding her concurrence in the assignment) was entitled to claim the whole fund,—all such assignments (although made by the husband *and* wife jointly) operating to pass only the interest which the husband had,—That is to say, they only operated subject to *the wife's legal title by survivorship* (*l*), and not as the wife's

Wife surviving her husband took her reversionary interests, which he had not reduced into possession; and husband's assignee could take no more than the husband had to give.

(*i*) *Wortham* v. *Pemberton*, 1 De G. & Sm. 644.
(*k*) *Tuer* v. *Turner*, 20 Beav. 560.
(*l*) *Purdew* v. *Jackson*, 1 Russ. 1.

assignment at all: And the Court had not even power to take the wife's consent to part with her legal title by survivorship (*m*),—That is to say, the legal right of survivorship was never bound by a Court of Equity (*n*); and it was, in fact, for that precise reason, that a claim by the wife for a settlement out of her reversionary interest in pure personal property, *so long as it continued reversionary*, was not maintainable (*o*),—*Scil.*, because she had something better.

Divorce of husband,—when, and when not, equivalent to his death,—as regards the property of his wife.

If the husband had been divorced by the wife, the divorce was deemed to be his death,—*Scil.*, for the purpose of defeating his right to a chose in action of the wife's, which was still (at the date of the divorce) outstanding and unreduced into possession (*p*). But, *nota bene*, if the wife's property had been settled on her marriage, and the husband (surviving his wife) took a life-estate under the settlement, the divorce was not (in that case) equivalent to death,—but the husband (contingently on surviving his wife) remained entitled to his life-estate (*q*),—*Scil.*, unless and until the Divorce Court (on a variation of the settlement) extinguished the life-estate.

Malins's Act, 20 & 21 Vict. c. 57. *Feme covert's* interests in personalty,—(a) Being in reversion;

By Malins's Act (20 & 21 Vict. c. 57), every married woman (unless she was restrained from anticipation) was enabled (with the concurrence of her husband), by deed acknowledged in the manner required by the Fines and Recoveries Act, to dispose of *every future or reversionary interest* (vested or contingent) belonging to her (or to her husband in her right (*r*)),—*in any pure personal estate*, to which she was entitled under any instrument (except her own marriage settlement (*s*)) *made* after the 1st December, 1857; and she was also thereby enabled to release or extinguish any power in regard to any such personal estate,—and to release and extinguish also her equity to a settlement out of *her personal property in*

(*m*) *Richards* v. *Chambers*, 10 Ves. 580.
(*n*) *Seaton* v. *Seaton*, 13 App. Ca. 61.
(*o*) *In re Slater's Trusts*, 11 Ch. Div. 227.
(*p*) *Wilkinson* v. *Gibson*, L. R. 4 Eq. 162.
(*q*) *Fitzgerald* v. *Chapman*, 1 Ch. D. 563.
(*r*) *Tennent* v. *Welch*, 37 Ch. Div. 622.
(*s*) *Harle* v. *Jarman*, 1895, 2 Ch. 419.

possession,—*Scil.*, under any such instrument as aforesaid, and excepting always as aforesaid: And a married woman may now, *semble*, by an ordinary unacknowledged *deed* even release and extinguish her powers generally (*t*),—*Sed quære;* However, a mere *spes successionis* of the wife is not a *future interest* within the meaning of Malins's Act (*u*). (b) Being in possession.

As regards a wife's choses in action (not being her separate estate), this distinction used to be taken (and still would be taken), namely:—Firstly, if the chose in action had belonged to the wife *before her marriage*, the action for its recovery required to be brought by the husband and wife jointly *as co-plaintiffs* (*x*),—In which case, if the husband predeceased the wife, the action survived to the wife,—and her right of survivorship was thereby rendered the more effective: But, Secondly, if the chose had accrued to the wife *during the coverture*, the husband might have sued therefor in his own name (and without adding his wife as a co-plaintiff),—or he might (at his option) have added the wife as a co-plaintiff,—In which latter case, the wife's right of survivorship (in case she survived) would again have been effective in the action (*y*). *Feme covert's* choses in action,—accrued before marriage, and accrued after marriage,—distinction between.

If the wife was entitled to a reversionary chose in action (whether legal or equitable), and it was neither separate estate of the wife nor within the provisions of Malins's Act, the effect of an assignment of it by the husband—or by the husband and wife jointly,—would have been different under different circumstances: For it is certain, firstly, that the wife by herself cannot assign; and, secondly, that the husband can only assign to another the interest to which he is himself entitled: Supposing, therefore, the wife to be entitled on the death of A. (a living person) *to a sum of stock standing in the names of trustees;* and supposing that her husband purports to make an assignment of this reversionary interest to B., a purchaser,—The benefit which accrues to B. (the pur- As to cases not within the Act,—operation of the assignment.

(*t*) *Hemphill* v. *Hemphill*, 1901, 2 Ch. 82.
(*u*) *Allcard* v. *Walker*, 1896, 2 Ch. 369.
(*x*) *Bates* v. *Dandy*, 2 Atk. 207.
(*y*) *Coppin's case*, 2 P. Wms. 496.

chaser) by virtue of the assignment will vary according as the husband, the wife, or A. dies first,—That is to say:—

(1) If the husband dies first, B. loses his purchase,—For the wife, having survived her husband, will (on the death of A.) be entitled by survivorship to the stock (*z*);

(2) If A. dies first, B. will then become entitled to a transfer of the stock,—*Scil.*, If the trustees choose to transfer it to him, and the wife has not meanwhile taken steps to enforce her equity to a settlement (*a*); but if the trustees refuse to transfer (or if the wife has insisted upon her equity) B. only takes the fund subject to the wife's equity to a settlement; and

(3) If the wife dies first,—Then, inasmuch as the husband (on taking out administration to his wife) would be able to recover the fund at law,—Therefore B. (as the husband's assignee) will (in this single case) obtain the whole fund,—subject (in general) to paying the husband his costs of obtaining the administration.

What did not amount to a reduction into possession.

It is to be remembered always, that any mere assignment by the husband of his wife's reversionary chose in action is not an actual (*b*),—or even a constructive (*c*),—reduction of it into possession; and therefore, whether the husband died in the lifetime of the prior life-tenant,—whereby the chose in action *could not* (as against the wife) be reduced into possession; or whether the husband survived the prior life-tenant and died (leaving the wife) before it was *actually* reduced into possession,—In either case, the chose in action survived to the wife (*d*). And where the wife was entitled to a legacy, and her husband was the executor of the will, and the wife survived him,—It was held, that there had been no reduction into possession by the husband, and the legacy survived therefore to the wife (*e*). Also, the transfer by a husband of the title-deeds of which his wife was equitable mortgagee,

(*z*) *Honner* v. *Morton*, 3 Russ. 65.
(*a*) *Greedy* v. *Lavender*, 13 Beav. 62.
(*b*) *Hornsby* v. *Lee*, 2 Mad. 16.
(*c*) *Le Vasseur* v. *Seratton*, 14 Sim. 116.
(*d*) *Widgery* v. *Tepper*, 5 Ch. 516.
(*e*) *Baker* v. *Hall*, 12 Ves. 497.

—the transfer being to secure a debt of the husband's own,—was held not to defeat the wife's right of survivorship (*f*): On the other hand, if the husband is in a position to maintain an action at law for the amount of the chose in action,—as for "*money had and received*,"—that is a reduction of the chose in action into possession (*g*); and if (in a pending action) the income has been ordered to be applied in payment of the husband's incumbrances, that is a reduction into possession (to the extent that the money is so applied (*h*)). Also, if the chose in action has accrued to the wife during the coverture (but not where it has belonged to her before the marriage), and the husband (suing for it in his own name alone) recovers judgment for it,—That is a reduction of it into possession (*i*); and, of course, any actual payment to an agent of the husband is (to the extent of such payment) a reduction into possession.

What did amount to a reduction into possession.

In a case of *In re D'Angibau* (*k*), A. was entitled in reversion (expectant on the prior life-estate of her mother) to a certain trust fund of pure personal estate,—and while an infant she married B. (an adult); and A. and B. settled the reversion, in trust for A. for her life, with power in her to appoint by deed or will, and (failing appointment) in trust for A.'s next of kin: And afterwards A. (while still being an infant) appointed the fund to B., and died leaving her mother and B. surviving,—and the Court said, that (subject to the continuing life-estate of the mother) B. was entitled to the whole fund,—either (1) as appointee of A.; or else (2) as surviving husband; and the next of kin of A. (who were mere volunteers) were, in either case, excluded from any share in the fund.

A wife may, at her own option and without regard to the children, waive or abandon her equity; and if (*e.g.*) she consents to the husband receiving the whole, the

Settlement, if made, must have been made on wife *and* children.

(*f*) *Michelmore* v. *Mudge*, 2 Giff. 183.
(*g*) *Dardier* v. *Chapman*, 11 Ch. Div. 442.
(*h*) *Tidd* v. *Lister*, 3 De G. M. & G. 869.
(*i*) *Oglander* v. *Baston*, 1 Vern. 396.
(*k*) 15 Ch. D. 228.

When the right of the children became indefeasible.

children will be defeated of their (so-called) rights: The inquiry therefore arose,—What was sufficient to create a title in the children?

And, Firstly, if the property was in the hands of trustees, it was not enough that the wife should have given them notice (in however formal a manner), that she demanded a settlement,—*Scil.*, because the trustees might (notwithstanding any such notice) have handed over the property to the husband;

And, Secondly, if the wife had even commenced an action to effectuate her equity, she might (at any time before the *settlement was completed*) have waived and defeated her equity (*l*),—and therewith the (so-called) rights of her children: And upon this waiver of the wife's equity, these points were established, namely:—

(1) That if the wife died before the action was commenced, the children had no right to a settlement (*m*);

(2) That if the wife died after action commenced, but before decree, her children had no right to a settlement (*n*); But

(3) If a decree (or order) had been made in the action (referring it to Chambers to approve a proper settlement), and the wife had then died before anything further had been done,—In this case (and in this case only), the children were entitled to the benefit of the decree, and might enforce such a settlement as the wife (if still living) would have been entitled to enforce (*o*).

Right of children might arise, out of contract by father.

The right of the children to a settlement also arose (after the death of their mother), where there was a *contract* by the father to make a settlement of his wife's property; and yet,—even after such a contract, just as after a decree,—the wife (if living) might (at any time before the *execution* of the settlement pursuant to the contract) have waived her equity,—and so have defeated the (so-called) rights of the children (*p*): But, *nota bene*, the wife, if an infant, could not have waived her equity.

(*l*) *Wallace* v. *Auldjo*, 1 De G. J. & Sm. 643.
(*m*) *Scriven* v. *Tapley*, 2 Eden, 337.
(*n*) *Fitzgerald* v. *Chapman*, 1 Ch. Div. 563.
(*o*) *Wallace* v. *Auldjo*, *supra*.
(*p*) *Baldwin* v. *Baldwin*, 5 De G. & Sm. 319.

What would defeat wife's right to a settlement.

The wife's equity to a settlement might also have been defeated *adversely* to her and to the children: Thus, when the debts of the wife (contracted *before* marriage) exceeded the fund to which the husband became entitled in her right (*q*),—or when the husband's debts to the estate out of which the wife's interest arose exceeded the amount of such interest (*r*),—In either of these two cases, the equity to a settlement was defeated,—although the wife's equity (which was *paramount* to any right in the husband (*s*)) would not have been wholly defeated by reason of the husband's indebtedness (*t*).

Usually, also, the wife's equity would have been defeated, if an adequate settlement had been already made upon her (*u*),—or if she was living in adultery apart from her husband (*x*). But, where both the husband and the wife were living in adultery, it was held,—setting off the one wrong against the other,—that she was entitled to her equity (*y*). And, lastly, a married woman would have defeated her equity, if she had committed a gross fraud: For example, where by a document purporting to bear date *before* (but in reality signed *after*) her marriage, she purported to assign certain property of hers to her husband,—and the husband thereupon sold the property, —the woman was precluded (*as against the purchaser*) from claiming her equity to a settlement (*z*).

Amount of settlement.

As regards the amount to be settled upon the wife and children,—Firstly, If the husband was solvent and refused to make a settlement upon his wife, the Court would not (because it could not (*a*)), *so long as he supported her*, prevent him from taking the income of her property; but what the Court did (in such a case) was, to retain the capital, *so as to give the wife a chance of taking it by survivorship* (*b*): But

Secondly, When the husband had become bankrupt (or

(*q*) *Barnard* v. *Ford*, L R. 4 Ch. App. 247.
(*r*) *Ward* v. *Ward*, 14 Ch. Div. 506.
(*s*) *Sloper* v. *Oliver*, L. R. 16 Eq. 481.
(*t*) *Poulter* v. *Shackell*, 39 Ch. Div. 471.
(*u*) *Bullman* v. *Wynter*, 22 Ch. Div. 619.
(*x*) *In re Lewin's Trust*, 20 Beav. 378.
(*y*) *Greedy* v. *Lavender*, 13 Beav. 62.
(*z*) *In re Lush's Trusts*, L. R. 4 Ch. App. 591.
(*a*) *Alexander* v. *McCullough*, cited in *Ball's case*, 2 Ves. 191.
(*b*) *Atcheson* v. *Atcheson*, 11 Beav. 485.

was notoriously insolvent), the amount to be settled was purely within the discretion of the Court; and in determining the amount, the Court took into consideration, generally, the conduct of the husband, and also the conduct and circumstances of the wife.

Form of settlement.

Usually, one *half* of the wife's property would be settled upon herself and the children (the remaining one half going to the husband or his assignees (*c*)): But in some cases, the *whole* fund would be settled on the wife and children,—as where it was barely sufficient for her and their maintenance; and where the husband was bankrupt or a lunatic (*d*), or had deserted his wife (*e*), the whole fund was settled. But, in the settlement (whether of the half or of the whole), the Court did not interfere with the marital right *further than was necessary to give effect to the wife's equity*,—So that the ultimate limitation in default of issue (of the existing marriage, or of any future marriage or marriages of the wife), was to the husband absolutely (*f*), *whether or not he survived the wife* (*g*).

How far settlement binding, as against creditors of husband.

Settlements made in pursuance of the equity to a settlement were binding upon the creditors of the husband,—*Scil.*, Because the statute 13 Eliz. c. 5 is only aimed against fraud; and a *bonâ fide* settlement will hold good as against the husband's creditors,—even although it should be voluntary (*h*),—and still more so, if it should be by way of compromise (*i*), or otherwise for value. Also, under the Bankruptcy Act, 1883, s. 47, "a settlement,—made on (or for the benefit of) the wife or children of the settlor, *of property which has accrued to the settlor after marriage in right of his wife*," is good as against the trustee in the bankruptcy of the husband. Also, where the Court decrees the settlement, it is a good settlement,—and is deemed to be for valuable "consideration" (*k*): And where the fund was in trustees, and they

(*c*) *In re Suggitt's Trusts*, L. R. 3 Ch. App. 215.
(*d*) *Scott* v. *Spashett*, 3 Mac. & G. 599.
(*e*) *Reid* v. *Reid*, 33 Ch. Div. 220.
(*f*) *Croxton* v. *May*, 9 Ch. Div. 388.
(*g*) *Gale* v. *Gale*, 6 Ch. Div. 144.
(*h*) *Cadogan* v. *Kennett*, 3 Cowp. 434.
(*i*) *Hobbs* v. *Hull*, 1 Cox, 445.
(*k*) *Simson* v. *Jones*, 2 Russ. & My. 365.

would not pay it to the husband, unless he made a settlement of it (which he did),—The settlement was held to be a good settlement (as against the husband's creditors), the action of the trustees operating like an order of the Court might have done (*l*).

Section IV Settlements in Derogation of Marital Rights.

So long as husbands became entitled on marriage to the property of their wives, any alienation of that property (in fraudulent derogation of the prospective marital rights) would, in equity, have been deemed null and void, ——For (it was said) if a woman, "*during the course of the treaty* of marriage with her," makes (without notice to the intended husband) a conveyance of any part of her property, it is a fraud,—and will be set aside (*m*).

Wife must not have committed a fraud on the marital right.

The decided cases supported the following conclusions relative to this theory of fraud, that is to say:—

Firstly, if a woman (entitled to property) *represented to her intended husband, during the marriage treaty,* that she was so entitled; and if, *during the same treaty,* she clandestinely conveyed away the property to a volunteer (*n*), *and the concealment continued until the marriage took place,*—That was a fraud on the husband, and he was entitled to relief (*o*); and it did not (for this purpose) matter, how meritorious (on the wife's part) the clandestine settlement might have been (*p*). Also, where a woman, ten months before the marriage, *but after the commencement of that intimate acquaintance with her future husband which ripened into marriage,* made a settlement of a sum of money *which he did not even know her to be possessed of,*—and she concealed from him both her right to the money and the execution of the settlement (*q*),—and the husband (ten years afterwards) became

If, during a treaty of marriage, she aliened *without husband's knowledge* property to which she had represented herself entitled, it was a fraud on him.

Same principle applicable, if he did not know her to be possessed of such property.

(*l*) *Wheeler* v. *Caryl*, Amb. 121, 122.
(*m*) *Strathmore* v. *Bowes*, 1 Ves. 22.
(*n*) *Lance* v. *Norman*, 2 Ch. Rep. 79.
(*o*) *England* v. *Downes*, 2 Beav. 528.
(*p*) *Taylor* v. *Pugh*, 1 Ha. 608.
(*q*) *Goddard* v. *Snow*, 1 Russ. 485.

acquainted with the settlement, and filed a bill to upset it,—The Court held, that the settlement was void, as a fraud upon his marital rights (*r*),—*Secus*, if the settlement had been for value and *bonâ fide* (*s*).

Not fraudulent, if to a purchaser for valuable consideration without notice.

But, Secondly, if the intended husband is made acquainted *before the marriage* with the fact of the settlement having been made, and still thinks fit to marry the woman, he is bound by the settlement (*t*).

A husband could only set aside a conveyance, when made pending the marriage with *him*.

Thirdly, the settlement must (in all cases) have been made *during the course of the treaty for marriage* with the particular husband challenging it; and accordingly, a settlement made by a widow upon herself and the children of a former marriage,—it being proved, that the person she afterwards married was not at the time of the settlement "her THEN intended husband,"—was held to be no fraud on *him* (*u*): And where the plaintiff (pending a treaty of marriage with A.) made a settlement with A.'s approbation,—and a few days afterwards she threw over A. and married B., *who had no notice of the settlement*, —The settlement was held good against B. (*x*).

If he had seduced his wife before marriage, her conveyance was good.

Lastly, where the husband had before the marriage *seduced* his wife, a settlement executed by her, *although without her husband's knowledge*, was supported (*y*),—the husband having committed a quasi-forfeiture of his rights.

Married Women's Property Act, 1882,—how it affects frauds on marital rights.

Since the Married Women's Property Act, 1882, it is difficult to see, how any conveyance by a woman about to marry can now (*whether it be secret or not*) be considered fraudulent as against her husband: Anyhow, the fraud on him would not be productive of legal damage; and fraud without legal damage is no ground of action (*z*), either at law (*a*) or in equity (*b*),—So that the equitable doctrine of Fraud on the Marital Rights has become, *semble*, a merely curious (and wholly obsolete) doctrine.

(*r*) *Downes* v. *Jennings*, 32 Beav. 290.
(*s*) *Llewellin* v. *Cobbold*, 4 Sm. & Giff. 376.
(*t*) *Nelson* v. *Stocker*, 4 De G. & J. 458.
(*u*) *England* v. *Downes*, 2 Beav. 531.
(*x*) *Strathmore* v. *Bowes*, *supra*.
(*y*) *Taylor* v. *Pugh*, 1 Hare, 608.
(*z*) *Smith* v. *Chadwick*, 9 App. Ca. 187, on p. 196.
(*a*) *Sullivan* v. *Metcalfe*, 5 C. P. D. 465.
(*b*) *Nash* v. *Calthorpe*, 1905, 2 Ch. 237.

CHAPTER XXII.

INFANTS.

Father, as guardian; and mother, as guardian.

A FATHER is the guardian by nature and nurture of his children during their infancy,—although (by the 36 Vict. c. 12) the Court may grant the custody of infants (under the age of sixteen years) to their mother; and (by the 49 & 50 Vict. c. 27) the mother (surviving the father) is constituted guardian; and the mother is, of course, the natural guardian of her own illegitimate children (if any).

Guardian, appointed by father or by mother.

By the 12 Car. II. c. 24, the father may,—by deed or (if not a minor) by will,—appoint one or more persons to be guardians of his children,—the guardians so appointed being usually called "*testamentary guardians,*" and the guardianship surviving to the survivor (*a*); and by the 49 & 50 Vict. c. 27, the mother may,—by deed or (if not a minor) by will,—appoint any person to be guardian of her children,—to act (after her own death) jointly with the father of the children, and (after her own death *and* the death of the father) jointly with the guardian (if any) appointed by the father.

Guardians,—position of, as regards their ward's estates.

Testamentary guardians are trustees (*b*); and although they acquire no estate in the lands of their ward (*c*), being (in that respect) unlike guardians in socage (*d*), still they are entitled to receive (and to give receipts for) the rents and profits (*e*),—*Scil.*, unless where trustees under s. 42 of the Conveyancing Act, 1881, have been appointed (*f*):

(*a*) *Eyre* v. *Shaftesbury*, 2 P. Wms. 102.
(*b*) *Mathew* v. *Brise*, 14 Beav. 341.
(*c*) *Gardner* v. *Blane*, 1 Ha. 381.
(*d*) *Rex* v. *Sutton*, 3 A. & E. 597.
(*e*) 12 Car. II. c. 24, ss. 8, 9.
(*f*) *In re Helyar*, 1902, 1 Ch. 391.

Also, the testamentary guardians are the proper parties to consent to any sale of the glebe lands, where (the infant) their ward is patron of the living (*g*).

Guardian, appointed by stranger.

And, *nota bene,* where, with the consent of the father, a stranger has put himself *in loco parentis* to the child, —and *has provided* for the maintenance and education of the child, and has (for that purpose) appointed guardians,—the appointment will be good,—or, at all events, will be upheld,—unless and until it is shown to be *to the prejudice of* the child (*h*).

Guardian, appointed by the Court.

Also, the Court may itself appoint a guardian,—the jurisdiction of the Court in this particular being founded on the *Prerogative* of the crown as *Parens Patriæ* (*i*): And although the jurisdiction in this particular had vested in the Court of Wards during that Court's continuance, still the jurisdiction reverted to (and re-vested in) the Court of Chancery on the abolition of the Court of Wards (*k*): The Court of Chancery may also (in a proper case) remove any guardian (and appoint another in his place), according as the welfare of the ward may require (*l*).

Infant becomes a ward of Court, when action commenced relative to his estate; or an order is made without suit.

When an action is commenced relative to an infant's estate or person, the infant (whether plaintiff or defendant) immediately thereupon becomes a ward of Court (*m*); and where an order for his (or her) maintenance has been made on summons at Chambers, the infant thereby also becomes a ward of Court (*n*); and similarly, upon an order for his (or her) custody (*o*): But if the child is an alien, none of these proceedings suffice, *semble,* to constitute him (or her) a ward (*p*). And note, that the Probate Division also may (under its general jurisdiction) make an order as to the custody of children during the whole period of their minorities (*q*).

(*g*) *Leigh* v. *Leigh*, 1902, 1 Ch. 400.
(*h*) *Lyons* v. *Blenkin*, Jac. 245.
(*i*) *Reg.* v. *Gyngall*, 1893, 2 Q. B. 232, on pp. 246, 247.
(*k*) *Smith* v. *Smith*, 3 Atk. 304.
(*l*) *In re McGraths*, 1893, 1 Ch. 143.
(*m*) *De Pereda* v. *De Mancha*, 19 Ch. Div. 451.
(*n*) *In re Hodge's Settlement*, 3 K. & J. 213.
(*o*) *In re Taylor*, 4 Ch. Div. 157.
(*p*) *In re Bourgeoise*, 41 Ch. Div. 310.
(*q*) *Thomasset* v. *Thomasset*, 1894, P. 295.

An infant must have property that Court may exercise its jurisdiction usefully.

The Chancery Division requires, in all cases, that the infant shall have property, before the Court will make him (or her) a ward of the Court; and this is because (Firstly) the Court can exercise the jurisdiction usefully, only where there is property which it can apply for the maintenance of the infant; and because (Secondly) where there is no property available, the law has made other provision (of an effective kind) for the protection of children requiring to be protected (*r*); and because (Thirdly), as regards the apprenticing of poor children, the exclusive jurisdiction as to that is in the justices (*s*).

Jurisdiction over guardians.

Parents are intrusted with the custody of their children, on the presumption that they will take due care of their education, morals, and religion: Therefore, the Court, if reasonably satisfied that the children are not being properly treated, will interfere even with parents (*t*), and with uncles and aunts (*u*). But a strong case must be made, before the Court will interfere with a father's guardianship; and (*e.g.*) where the father is insolvent, —or his conduct is loathsome and corrupt (*x*), and he is neglecting the education of the children, or is ill-treating them (*y*),—It is not (even in these cases) a matter of course, to take the father's guardianship away; but the danger to the children must be proximate and serious (*z*), —So that even a divorced father may continue to be the guardian of his male children (*a*), just as he may also not so continue (*b*). However, the Court may now refuse to order the delivery up of a child even to its father (*c*); and may (*in favour of the mother*) override altogether the common law rights of the father (*d*): But these extreme things the Court will not, usually, do; but for incest, it will (*e*).

(*r*) 4 Edw. VII. c. 15; 8 Edw. VII. c. 67.
(*s*) *Webb* v. *England*, 29 Beav. 57.
(*t*) *In re Besant*, 11 Ch. Div. 508.
(*u*) *Ex parte Hopkins*, 3 P. W. 151.
(*x*) *Shelley* v. *Westbrooke*, Jac. 266, *n.*
(*y*) *Whitfield* v. *Hales*, 12 Ves. 492.
(*z*) *In re Elderton* (*Infants*), 25 Ch. Div. 220.
(*a*) *Skinner* v. *Skinner*, 13 P. Div. 90.
(*b*) *Swift* v. *Swift*, 34 Beav. 266.
(*c*) 54 Vict. c. 3, ss. 1, 3.
(*d*) 49 & 50 Vict. c. 27.
(*e*) 8 Edw. VII. c. 45, s. 1.

Education of his ward.

The guardian determines the mode of (and place for) the education of his ward,—and the Court will aid him in that (*f*). But, in general, the religious education of the ward must be according to the religion of the father (*g*),—although the father may have signified to the contrary (*h*); and a Protestant guardian, if he becomes a Roman Catholic,—and, conversely, a Roman Catholic guardian, if he became a Protestant,—may be removed on that account alone,—assuming always that the welfare of the infant requires that rather extreme remedy (*i*).

When guardian gives security.

If the guardian wishes to take his ward out of the jurisdiction of the Court, the Court requires security from the guardian, before sanctioning the removal; and (in and by the security so given) the guardian usually undertakes, to bring the ward back again within the jurisdiction, if and whenever the Court may require him to do so (*k*).

Guardians must not, in general, change character of ward's property.

Guardians will not, ordinarily, be permitted to change the personal property of the ward into real property, or his real property into personalty,—*Scil.*, because such a conversion may affect not only the rights of the infant himself, but also (if he should die under age) the rights of his representatives: But where the change is manifestly for the benefit of the infant, the guardian may effect the conversion (*l*),—as he may also do, for necessary repairs or other necessary payments (*m*); and the Court will sanction the act of the guardian, if it be such as the Court would itself (under the like circumstances) have done by its own order (*n*); but the expense of all ordinary repairs should, of course, be paid out of income (*o*).

(*f*) See *Tremain's case*, 1 Str. 167, where, "being an infant, he went "to Oxford, contrary to the orders of his guardian, who would have "him go to Cambridge; and the court sent a messenger to carry him "from Oxford to Cambridge; and upon his returning to Oxford, there "went another, *tam* to carry him to Cambridge, *quam* to keep him there."

(*g*) *In re Violet Nevin*, 1891, 2 Ch. 299.

(*h*) *In re Newton* (*Infants*), 1896, 1 Ch. 740.

(*i*) *F.* v. *F.*, 1902, 1 Ch. 688.

(*k*) *Ware* v. *Polhill*, 11 Ves. 278.

(*l*) *Camden* (*Marquis*) v. *Murray*, 16 Ch. Div. 161.

(*m*) *In re Jackson*, 21 Ch. D. 786.

(*n*) *Ex parte Phillips*, 19 Ves. 122.

(*o*) Conveyancing Act, 1881, s. 42.

In all these cases of conversion, there is no equity (as between the real and personal representatives of the infant) for a reconversion: But, all the same, lands purchased by the guardian with the infant's personal estate (or with the rents and profits of his real estate) will be deemed to remain personalty; and real property turned into money will be deemed to remain real estate,—in each case, *in the event of the death of the infant before he arrives of age:* Also, when the Court directs such a conversion, it invariably directs, that the new investment shall (*but only in case the infant shall die under twenty-one*) be held in trust for the benefit of those who would be entitled to it if it had remained in its original state (*p*). But *if the infant attains twenty-one* (although he should die the next day), his respective representatives must take the property according to its actual condition at the time of the death,—Wherefore a mortgage (rather than a sale) should be resorted to, where a capital sum has to be raised, for expenditure on an infant's estate (*q*).

Representatives who would have taken before the change, still take after the change,—*but only if infant dies under age.*

The sanction of the Court to the marriage of a ward of Court (whether male or female) is invariably required to be obtained (*r*); and if a man should marry a female ward (or a woman should marry a male ward), without the sanction of the Court, he or she (and all others concerned in aiding or abetting the act) will be guilty of a contempt of Court,—and may be punished by imprisonment (*s*): Moreover, their ignorance of the fact (that the infant is a ward) will not be sufficient to acquit them of the contempt, although it may weigh in determining the severity of their punishment. Also, with a view to preventing the improper marriage of the ward, the guardian may be required by the Court, to enter into a recognisance, that the infant shall not marry without the leave of the Court,—In which case, if the infant should afterwards marry (though without the privity of the guardian), the recognisance will (in strictness) be forfeited. And where there is reason to suspect an improper marriage being contem-

Marriage of ward of Court, must be with consent of Court.

Improper marriage of ward, restrained by injunction.

(*p*) *Foster* v. *Foster*, 1 Ch. Div. 588.
(*q*) *In re Jackson*, *supra*.
(*r*) *Smith* v. *Smith*, 3 Atk. 305.
(*s*) *Ex parte Mitchell*, 2 Atk. 173.

plated, the Court will (by injunction) interdict communications between the ward and his or her admirer (*t*),—and (if necessary) will even remove the guardian, and commit the ward to the care and custody of another guardian (*u*).

Settlement must be approved by Court.

Upon the intended marriage of a ward, the Court (upon petition) refers it to Chambers, to ascertain and report, whether the match is a suitable one,—and also what settlement ought to be made; and if the marriage has been actually celebrated without its sanction, the Court compels a suitable settlement,—and commits the husband for his contempt, and refuses to discharge him until he has made the proper settlement (*x*). Also, under the 4 Geo. IV. c. 76, the guardian of any minor, who has married without his consent, may obtain a declaration of forfeiture against the party, who (by falsely stating that such consent has been given) shall have procured the marriage,—and the Court will thereupon decree a settlement on the other party and the issue of the marriage (*y*).

Settlement under Marriage Act, 4 Geo. IV. c. 76.

Binding settlements by infants under 18 & 19 Vict. c. 43.

By the Infants' Settlement Act, 1855 (18 & 19 Vict. c. 43), an infant,—not being under twenty years of age if a male, or seventeen years if a female,—is enabled (with the approbation of the Court, to be obtained on petition or summons) to make a binding settlement on marriage of his or her real and personal estate (whether in possession reversion remainder or expectancy),—*Scil.*, as fully as if he or she were of full age (and not more fully (*z*)),—and so that the settlement shall (except as to any estate tail of the infant) remain binding on him or her, although he or she should afterwards die under age.

Father bound to maintain his children, though there

A father (being bound to maintain his children) will not, *usually*, have any allowance out of their property for that purpose; but where the father is not able to give

(*t*) *Pearce* v. *Crutchfield*, 14 Ves. 206.
(*u*) *Tombes* v. *Elers*, 1 Dick. 88.
(*x*) *Field* v. *Moore*, 7 De G. M. & G. 691.
(*y*) *In re Sampson and Wall*, 25 Ch. Div. 482.
(*z*) *Seaton* v. *Seaton*, 13 App. Ca. 61.

his child an education *suitable to the expectant fortune of the child*, maintenance will be allowed. Also, if there is a *contract* (amounting to a trust), that a particular property shall be applied for the maintenance and education of the children (*a*), that property (or a sufficient part of the income thereof) must be applied without reference to the ability or inability of the father to maintain and educate the children; and, in such a case, the past accumulations of income may also be, from time to time, resorted to (and used) for the purpose (*b*).

is a provision for maintenance.

When father is entitled to an allowance?

In case a father should apply his child's property towards its maintenance, *under circumstances in which he would not have been allowed anything for maintenance*, he may be ordered to refund: And, on the other hand, when he has applied his own property for the child's maintenance, *under circumstances in which he would have been allowed something for that purpose*, he will receive a sum in respect of such past maintenance (*c*). And, in allowing maintenance for an infant, regard will be had to the state and condition of the family: For example, where there are *younger children* (numerous and unprovided for), the Court will make a liberal allowance to the eldest son (as being *in loco patris* (*d*)), in order that he may be the better able to maintain his brothers and sisters,—and so derive (indirectly) a greater benefit himself from their society (*e*); and a liberal allowance will also sometimes be made for infants, in order to relieve or assist their *parents* even, when these are in comparatively distressed circumstances (*f*): But note, that, in all these cases, it is the infant's benefit which is considered, although the benefit he derives may sometimes be slightly remote.

How allowance is regulated?

Upon the application for maintenance, the Court has jurisdiction (without suit) to charge the expenses of the

Past maintenance,—charge on real estate of infant for.

(*a*) *Wilson* v. *Turner*, 22 Ch. D. 521.
(*b*) *Edwards* v. *Grove*, 2 De G. F. & J. 210.
(*c*) *Welch* v. *Channell*, 26 Ch. Div. 58.
(*d*) *Petre* v. *Petre*, 3 Atk. 511.
(*e*) *Bradshaw* v. *Bradshaw*, 1 J. & W. 647.
(*f*) *Brown* v. *Smith*, 10 Ch. Div. 377.

past maintenance (together with the costs of the application) on the *corpus* of the fee simple estates of the infant (*g*),—such charge being in the nature of a judgment for *necessaries*, followed up by execution against the infant's real estate (*h*): But no such charge can be made, if the infant is entitled in remainder only (and not in possession), or is entitled in tail only (*i*).

Maintenance, when and when not given, out of rents and profits directed to be accumulated.

Where a testator leaves property of considerable value, to be accumulated for twenty-one years (or any specified number of years),—and directs that the accumulations shall be laid out in the purchase of land, to be held in trust for A. B. for his life and afterwards for his eldest son for life, and for the first and other sons of such eldest son successively in tail,—If A. B. is possessed of a moderate income only (which is insufficient for the maintenance and education of his sons, to fit them for the prospective positions in life which by reason of the testator's deferred bounty they will fill), the Court will (notwithstanding the express trust for accumulation) allow to the father an immediate present allowance for the maintenance and general benefit of the infants (*k*). And where a testator directed the income of his real and personal estates to be accumulated for twenty-one years, and gave the accumulated estates to his sister for life, with successive remainders to her three sons and their respective children,—The Court directed a present annual sum to be paid to the sister out of the income of the personal estate for the maintenance and education of her three sons (*l*). But the Court requires to be satisfied (in all such cases), that there are special circumstances justifying it, in practically setting aside (*pro tanto*) the trust for accumulation,—and (in the absence of such special circumstances) will not interfere with that trust, notwithstanding the trust may be hurtful and capricious (*m*).

(*g*) *In re Howarth*, L. R. 8 Ch. App. 415.
(*h*) *In re Hamilton*, 33 Ch. Div. 397.
(*i*) *In re Hambrough*, *Hambrough* v. *Hambrough*, 1909, 2 Ch. 620.
(*k*) *Havelock* v. *Havelock*, 17 Ch. Div. 807.
(*l*) *Collins* v. *Collins*, 32 Ch. Div. 229.
(*m*) *Hunt* v. *Parry*, 32 Ch. Div. 383.

CHAPTER XXIII.

LUNATICS, IDIOTS, AND PERSONS OF UNSOUND MIND.

Unsoundness of mind, no ground for jurisdiction in equity.

UNSOUNDNESS of mind, of itself, gives the Court of Chancery no jurisdiction (*a*), the jurisdiction of that Court relative to the estates of lunatics arising (where it arises) upon some independent ground of trust, partnership, or the like (*a*): In fact, the jurisdiction in Lunacy was in existence long before the Court of Chancery existed,—the jurisdiction having been originally vested in the Court of Exchequer as being the Court which had special care of the crown's prerogative in matters of revenue,—Which prerogative was subsequently defined or regulated by the Statute of Prerogatives (17 Edw. II.), the 9th chapter relating to idiots, and the 10th chapter to lunatics; and it was under that statute, that the crown acquired (in effect) the management of the estates of idiots and of lunatics.

The jurisdiction in Exchequer was in the Exchequer upon inquisition,—because a matter of revenue.

Exchequer jurisdiction in Lunacy, transferred to Lord Chancellor.

The jurisdiction of the Court of Exchequer in Lunacy was very early superseded; and the Lunacy jurisdiction was subsequently vested in divers Courts and in divers officials (not profitable to specify here),—Until, eventually, the practice became a constant one, for the crown to delegate the care and custody of lunatics (and of their estates) to the Lord Chancellor,—not as being the President of the Court of Chancery, but as being an executive officer of the highest standing in the realm, and enjoying the most intimate personal relations with the crown. But, *nota bene*, the fact (although an accident), that the Lord Chancellor was also a great judicial officer (and competent as an adviser in matters of law and equity), was a reason (not without its weight) which helped to permanently fix the Lunacy jurisdiction in the President of the Chancery Court.

(*a*) *Beall* v. *Smith*, L. R. 9 Ch. App. 85.

Lords Justices in Chancery concurrently with, and in aid of, Lord Chancellor, acquired the jurisdiction, and now exercise it.

Shortly after the appointment of the Lords Justices in 1851 (*b*) as a Court of Appeal in Chancery (with all the original and other jurisdiction of the Lord Chancellor in the Court of Chancery),—a warrant under the Queen's sign-manual was made out to each of the Lords Justices, intrusting him with the care and custody of lunatics; and under the Lunacy Regulation Act, 1853 (*c*), the jurisdiction of the Lords Justices in Lunacy (concurrently with that of the Lord Chancellor) was continued. Then, afterwards, upon the coming into operation of the Judicature Acts, 1873-75,—when the Lords Justices became a mere limb of the new Court of Appeal (and were therefore indirectly deprived of all *original* jurisdiction in the Chancery Division of the High Court),—the Lords Justices were appointed (by virtue of s. 51 of the Judicature Act, 1873) "*additional judges*" of the High Court of Justice,—*for the purpose of more effectively exercising their jurisdiction in Lunacy* (*d*), and so as to possess (and be able to exercise) all the original jurisdiction of Chancery, that was ancillary to the jurisdiction in Lunacy (*e*). And, by the Lunacy Act, 1890 (*f*), ss. 108—149, the jurisdiction of the Lords Justices is (in effect) continued,—but with a recognition of the fact, that the Lunacy jurisdiction is peculiar,—And, for example, the appeal in Lunacy from the Lord Chancellor (or from the Lords Justices) would still be to the Judicial Committee of His Majesty's Privy Council (as distinguished from the House of Lords (*g*)),—Excepting that divers orders in Lunacy do (in fact) go (on appeal) to the Court of Appeal itself (*h*),—these last-mentioned appeals being (for the most part) from the Masters in Lunacy.

Beall v. *Smith*, —what proceedings in Chancery would be a contempt on the Lunacy jurisdiction.

A person of unsound mind is, usually, found a lunatic on due inquisition: And in such a case, a committee is appointed of the person and of the estate of the lunatic; and such committee (once he is appointed) becomes an officer of the Court in Lunacy; and no person may there-

(*b*) 14 & 15 Vict. c. 83.
(*c*) 16 & 17 Vict. c. 70.
(*d*) *Re Cathcart*, 1893, 1 Ch. 466.
(*e*) *In re Platt*, 36 Ch. Div. 410.
(*f*) 53 Vict. c 5.
(*g*) *Re Windham*, 4 De G. F. & J. 53.
(*h*) *Re Sefton*, 1898, 2 Ch. 378.

after (*without first obtaining the leave of the Court in Lunacy*) commence or continue any proceedings for the lunatic's protection (*i*). Nevertheless, a solicitor may lawfully enough commence (and also continue) an action, on behalf of a person whom he believes to be sane, and although an inquiry should be pending regarding the plaintiff's state of mind,—Only, once the lunacy is found (or once there is a *constat* that the intending plaintiff is insane), the solicitor should no longer *continue* the action,—Because application may at all times be made to the Court in Lunacy (by the lunatic's *committee*) for the Court's sanction as to anything that may require to be done. However, on the lunatic's death, the whole jurisdiction of the Court in Lunacy comes to an end, and the jurisdiction in Chancery is restored again in full (*k*).

Lunacy Act, 1890,—directions and management under.

For the better guidance of the committee in Lunacy, the Lunacy Act, 1890 (in its 116th and following sections), contains various directions and authorities to the committee regarding the management of the lunatic's estate; and when these directions or authorities do not suffice, or are inapplicable, the Court in Lunacy will (by virtue of its general jurisdiction) give any special direction (*l*).

Lunatic's maintenance, —allowance for, how regulated.

Regarding the maintenance and support of the lunatic, the Court (as regards all legal questions and matters) follows the law,—and will (*e.g.*) hold the lunatic's estate to be liable for all *necessaries* supplied to him (*m*); and charging orders against his estate may be obtained, on judgments against the lunatic for such necessaries (*n*),—and even against funds which are in Court (*o*). But, as regards matters falling within its own exclusive jurisdiction, the Court in Lunacy acts very much according to its own discretion,—having regard to the magnitude of the estate and to the necessities of the lunatic (*p*): And,

(*i*) *Beall* v. *Smith*, L. R. 9 Ch. App. 85.
(*k*) *In re Seager-Hunt, deceased*, 1906, 2 Ch. 295.
(*l*) *Re Ray*, 1896, 1 Ch. 468.
(*m*) *Rhodes* v. *Rhodes*, 44 Ch. Div. 94.
(*n*) *Re Hunt*, 1900, 2 Ch. 54, *n*.
(*o*) *Llewellin* v. *Brown*, 1900, 1 Ch. 489.
(*p*) *Re Whitaker*, 42 Ch. D. 119.

Rights of his creditors,—subordinated.

accordingly, the rights of the lunatic's creditors are subordinated to the needs of the lunatic,—*Scil.*, as regards all the property of the lunatic which has come within the protection of the Court (*q*), and to the extent of the lunatic's interest therein (*r*): And if the lunatic is a bankrupt, the title of the trustee in his bankruptcy is *subject to the necessary expenses of the lunatic's maintenance* being first duly provided for out of his property (*s*),—Except only as regards any portion of the property already come to the hands of the bankruptcy trustee (*t*).

His next of kin,—provision for.

In the case of lunatics (equally as in the case of infants), the Court will (and not unfrequently does) make an allowance designed to benefit directly the near relatives of the lunatic, and in that way to indirectly benefit the lunatic himself (*u*); but the Court is very chary of increasing that allowance,—or even of making it in the first instance (*x*); and as regards anything not expended at the lunatic's death, the committee is accountable (*y*). And, in one case, where a lunatic advanced in years was tenant for life, with remainder in tail to his nephew, the Court directed an allowance of £500 per annum to be made to the nephew (out of *the surplus income* of the lunatic, after providing for the lunatic's maintenance),—but upon the terms of the nephew charging the estate with the repayment of the sums received (*z*).

Conversion of lunatic's estate.

In the case of a lunatic, the Court will not generally alter the state of the lunatic's property,—so as to affect the rights of his representatives: But where it is for the benefit of the lunatic himself,—*the interest of the lunatic being the sole object of consideration*,—the Court will make the conversion; and there not being (as between the heir and the next of kin of the lunatic) any equity for a re-conversion, they will respectively take the pro-

His representatives take the fund in the character in which it is actually found;

(*q*) *Re Clarke*, 1898, 1 Ch. 336.
(*r*) *Davies* v. *Thomas*, 1900, 2 Ch. 462.
(*s*) *In re Farnham*, 1895, 2 Ch. 799.
(*t*) *In re Farnham*, 1896, 1 Ch. 836.
(*u*) *In re Weaver*, 21 Ch. Div. 615.
(*x*) *In re Darling*, 39 Ch. Div. 208.
(*y*) *Strangeways* v. *Read*, 1898, 2 Ch. 419.
(*z*) *In re Sparrow*, 20 Ch. Div. 320.

perties (to which they are respectively entitled) according to the actual character in which they find them (*a*). However, where the Court itself makes the conversion, the order, in general, preserves the original character of the property,—providing (*e.g.*) in a partition action, that the proceeds of sale shall be settled to the same uses as those to which the land stood settled before the sale (*b*): Also, in barring the estate tail of a lunatic, the Court will so exercise its power in that behalf, as not to affect the rights of the remaindermen (*c*); and in enfranchising the copyholds of a lunatic, the Court will not affect the beneficial rights of the customary heir (*d*); and even where chattels have been specifically bequeathed by the lunatic, and they are afterwards sold in his subsequent lunacy, the legacy will not, in the general case, be adeemed by the sale (*e*). But, *nota bene*, all these matters should be provided for at the time, and in and by the order itself, —so as not to be left to be litigated afterwards (*f*).

But the order of the Court usually protects the rights of the representatives.

As regards lunatics not so found,—Where there are trusts to execute, or the fund has been paid into Court (Chancery Division), the Court acquires jurisdiction over the lunatic (*g*); and in the case of any such lunatic (or in the case of any one who is lawfully detained as a lunatic (*h*)), the Chancery Division will recognise and affirm the position of one assuming to act as the guardian, —and will (*e.g.*) direct payment out to him of a fund in Court (belonging to the lunatic), upon his undertaking to apply the income for the maintenance of the lunatic(*i*); and even the capital itself will (in a proper case) be directed to be so paid out and applied (*k*).

Lunatics not so found.—jurisdiction in respect of.

Allowance for maintenance of.

In a partition action also, such a lunatic may sue by his next friend (*l*): And where a lunatic not so found is the

Directions as to, and management of, estate.

(*a*) *Pendarves* v. *Hartley*, 1901, 2 Ch. 498.
(*b*) *Att.-Gen.* v. *Ailesbury* (*Marquis*), 12 App. Ca. 672.
(*c*) *Re Fox*, 33 Ch. Div. 37.
(*d*) *Re Ryder*, 20 Ch. Div. 514.
(*e*) *In re Palmer*, *Thomas* v. *Marsh*, 1911, W. N. 171.
(*f*) *In re Hole*, 1905, 2 Ch. 384.
(*g*) *Re Pagani*, 1892, 1 Ch. 236.
(*h*) *Re Watkins*, 1896, 2 Ch. 336.
(*i*) *Re Brandon*, 13 Ch. Div. 773.
(*k*) *Re Tuer*, 32 Ch. Div. 39.
(*l*) *Halfhide* v. *Robinson*, L. R. 9 Ch. App. 373.

sole surviving trustee of a settlement, the Court has jurisdiction to appoint a new trustee in his place (*m*),—and occasionally (but not in all cases) to make a vesting order. But the jurisdiction (as to vesting orders) is now better exercised under the Lunacy Act, 1890, ss. 133—142; and (as regards also the *beneficial* properties of the lunatic) it is usually preferable to proceed before the Master in Lunacy,—*Scil.*, under the Lunacy Act, 1890, the 116th and following sections of that Act having given many facilities (by means chiefly of a Receiver (*n*)) for the management of the property of this class of lunatics, including the exercise of his power to *lease* under the Settled Land Act, 1882 (*o*). But if it was desired, that a lunatic *not so found* should exercise (as tenant for life) the power of *sale* given to him by the last-mentioned Act, even the Court of Lunacy could not give its sanction to that, unless the lunatic was first found a lunatic (*p*): However, he may now exercise that power of sale also (*q*); and he always could exercise the express power of sale contained in the settlement.

Debts,—payment of.

The creditors of a lunatic not so found cannot get paid out of his estate, *to the prejudice of the lunatic himself being properly provided for;* but (subject to that) they may proceed against him for his debts,—being debts for necessaries supplied to him (*r*).

Past maintenance, a provable debt;

And on the lunatic's death, the guardians of the union, which was chargeable for his maintenance and which has maintained him, will be entitled to prove as creditors for the cost of his maintenance,—*Scil.*, in a creditor's action for the administration of the lunatic's estate (*s*), the relief being,—usually (*t*), but not invariably (*u*),—limited to six years' arrears. Also, *semble*, these guardians may, in

(*m*) *Re M.*, 1899, 1 Ch. 79.
(*n*) *Re B. A. S.*, 1898, 2 Ch. 392.
(*o*) *Re Salt*, 1896, 1 Ch. 117.
(*p*) *Re Martha Baggs*, 1894, 2 Ch. 416, *n.*
(*q*) 8 Edw. VII. c. 47, s. 1.
(*r*) *Re Rhodes*, 1890, 44 Ch. D. 94.
(*s*) *Re Taylor*, 1901, 1 Ch. 480.
(*t*) *Stamford Union* v. *Bartlett*, 1899, 1 Ch. 72.
(*u*) *Wandsworth Union* v. *Workington*, 1906, 1 K. B. 420.

a proper case, obtain (for this purpose) a grant of administration to some nominee of their own (*x*). Also, even in the lunatic's lifetime, these guardians may obtain a magistrate's order, giving them the means of enforcing payment out of the lunatic's estate,—But not so as to interfere with the possession of any receiver in the Lunacy (*y*), and not so as to oust in any way the jurisdiction of the Court of Lunacy (*z*). Also, in the case of a person detained as a criminal lunatic, the crown would have all the same rights as the poor law guardians,—and without the six years' limit (*a*).

and recoverable even in the lunatic's lifetime.

(*x*) *Re Edith Mary French*, 1910, P. 169.
(*y*) *Winkle* v. *Bailey*, 1897, 1 Ch. 123.
(*z*) *In re Tye*, 1900, 1 Ch. 249.
(*a*) *In re J.*, 1909, 1 Ch. 574.

PART III.

THE ORIGINALLY CONCURRENT JURISDICTION.

Concurrent jurisdiction,—nature of;

THE originally concurrent jurisdiction of equity was a jurisdiction in respect of *legal* rights,—the jurisdiction being assumed and exercised, either because the remedy in equity was a more perfect remedy than the remedy at law (*a*), or because the remedy at law either never existed at all (*b*), or was become unavailable (*c*): But, occasionally, the concurrent jurisdiction might arise out of the auxiliary jurisdiction,—an application for the *aid* of equity, for the better enforcement of a legal right, sometimes disposing the Court to enforce also the legal right: For example, if the suit in equity was for an *injunction*, in aid of the action of waste at law, equity (on granting the injunction) might have granted also the damages for the waste (*d*): Also, where the suit in equity was for *discovery*, in aid of an action at law for damages, equity might have both granted the discovery and awarded also the damages: For example, in *Atkins* v. *Farr* (*e*), where the defendant (who was a gentleman of the town) had given to the plaintiff (who was an orange girl at a theatre) his bond in £1,000, conditioned for the payment to her of a sum of £500 in cash, if he did not marry her within the year; and the defendant (by a subterfuge) got the bond back again from the plaintiff,—and burnt it,—In the plaintiff's suit in equity for *discovery* of the bond, the Court gave her that discovery, and gave her relief in damages also: and the plaintiff having meanwhile died, her mother (as her administratrix) obtained payment of the £500 with interest and costs.

also, growth of, incidentally to auxiliary;

and illustration of.

(*a*) *Ochsenbein* v. *Papelier*, L. R. 8 Ch. App. 695.
(*b*) *Jenner* v. *Morris*, 3 De G. F. & J. 45.
(*c*) *Pulteney* v. *Warren*, 6 Ves. 72.
(*d*) *Jesus College* v. *Bloom*, 3 Atk. 262.
(*e*) 1 Atk. 287.

CHAPTER I.

ACCIDENT.

Accident,—true meaning of, in equity.

"*Accident*" (in equity) is any unforeseen event occasioning loss, and which (or the loss occasioned by it) is not attributable to any misconduct in the party, or to any negligence (or culpable inadvertence) on his part. For example, if an annuity (given by will) has been directed to be secured by the purchase of stock,—and an investment (sufficient for the purpose) at the time has been made, but the stock is afterwards reduced by Act of Parliament,—In such a case, equity relieves the executor from all liability on that account (*a*), and decrees the residuary legatee to make up the deficiency,—*Scil.*, where the residue is liable for the annuity (and not otherwise (*b*)).

Cases for relief at law,—and in equity.

In some cases of accident, the Courts of law (even from the earliest date) afforded adequate relief,—and latterly these Courts came to interpose more frequently, the Legislature having (from time to time) conferred on them the remedial powers of Courts of Equity; but the Courts of Equity did not lose their jurisdiction, by reason merely of the Courts of law acquiring it (*c*).

There are three groups of accidents in which equity exercises jurisdiction, namely,—

(1) Lost and Destroyed Documents;
(2) Imperfect Executions of Powers; and
(3) Erroneous Payments.

(*a*) *Davies* v. *Wattier*, 1 Sim. & St. 463.
(*b*) *Att.-Gen.* v. *Poulden*, 3 Ha. 555.
(*c*) *Kemp* v. *Pryor*, 7 Ves. 246, 250.

(A) Documents lost or destroyed.

(1) Bonds being *lost*.

(A) *Lost and Destroyed Documents.*—Firstly, As regards lost Bonds,—There was originally no remedy on these at law,—without *profert* (or production) of the bond in Court (and *oyer* of the bond),—although, afterwards, a Court of law (upon allegation of the loss) dispensed with the *profert* (*d*); but equity alone could (formerly) have given the suitable relief,—that is to say, relief upon condition that the plaintiff should give an indemnity against the loss.

(2) Title-deeds being *lost*.

And, Secondly, As regards lost Title-Deeds,—The loss was not of itself a ground for coming into equity, because the law might (upon proof of the loss) have received secondary evidence of them; and to enable any one to come into equity for relief by reason of the loss, it was therefore necessary, to allege some special inconvenience from the loss,—as (*e.g.*) the desire to be established in the possession (*e*), or the undue peril to which the loss exposed the plaintiff in the future assertion of his rights (*f*).

The relief against accidents,—is adapted to the circumstances.

The relief which the Court gave, in case of accidents, was adapted to the circumstances of the case: For example, in a case where leasehold property of the wife's had been settled on the husband for his life, with remainder to the wife (who was the defendant) for her life, with remainder (failing issue of the marriage) to the plaintiff (who was the defendant's niece by marriage); and the husband died, and the wife survived, and there was no issue; and the wife had burned the settlement,—The Court decreed the wife to assign the property to trustees, to hold upon the still subsisting trusts of the settlement,—*Scil.*, because the possession itself could not be given to the plaintiff, while and so long as the widow's prior life-interest continued (*g*).

(3) Negotiable instruments,—(a) being *lost*.

Thirdly, As regards lost Negotiable Instruments,—If a bill, note, or cheque (whether negotiable by indorsement and delivery, or by delivery only) was lost, no action was competent at law, either on the bill or note itself or on the consideration (*h*); and, therefore, the remedy

(*d*) *Read* v. *Brookman*, 3 T. R. 151.
(*e*) *Dalston* v. *Coatsworth*, 1 P. Wms. 731.
(*f*) *Dormer* v. *Fortescue*, 3 Atk. 132.
(*g*) *Dalston* v. *Coatsworth*, *supra*.
(*h*) *Crowe* v. *Clay*, 9 Exch. 604.

was in equity. But, as regards bills and notes, the Bills of Exchange Act, 1882 (*i*), ss. 66, 70, has now provided, that where a bill is lost *before* it is overdue, the person who (but for the loss) would be the holder of the bill, may have from the drawer another bill of the same tenor, upon giving the usual indemnity; and, in any action on the bill (*on a sufficient indemnity being given*), the loss is not to be set up. But, as regards destroyed negotiable instruments,—The accidental *destruction* was never a ground for coming into equity, because the party who (but for the destruction) would have been the holder of the bill, could always have sued at law on the original consideration (*k*),—In which respect, bills and notes were very different from bonds,—for the original consideration (for the bond) was merged in the specialty debt due on the bond, and the accidental *destruction* of the *bond* was therefore a sufficient ground for coming into equity.

(b) Being *destroyed*.

(B) *Defective Execution of Powers*.—The total *non-execution* of a mere power will not be aided in equity; but where (either from accident or mistake) there is a *defective* execution of the power, equity will relieve,—the relief being, however, given, only in favour of the following persons, namely:—(1) A purchaser (*l*),—which term includes a mortgagee and a lessee; (2) A creditor (*m*); (3) A wife (*n*); (4) A legitimate child (*o*); and (5) A charity (*p*). But a defective execution will not be aided, in favour of (*e.g.*) A husband (*q*); A natural child (*r*); A grandchild (*s*); or Remote Relations generally, or Volunteers (*t*).

(B) Powers,—relief, where defective execution;

As regards the defects which will be aided,—These may be said, generally, to be *any which are not of the very essence and substance of the power*,—a defect (*e.g.*) in

and the defects which are relievable.

(*i*) 45 & 46 Vict. c. 61.
(*k*) *Wright* v. *Maidstone*, 1 K. & J. 708.
(*l*) *Fothergill* v. *Fothergill*, 2 Freem. 257.
(*m*) *Pollard* v. *Greenvil*, 1 Ch. Ca. 10.
(*n*) *Clifford* v. *Burlington*, 2 Vern. 379.
(*o*) *Bruce* v. *Bruce*, L. R. 11 Eq. 371.
(*p*) *Att.-Gen.* v. *Sibthorp*, 2 Russ. & My. 107.
(*q*) *Watt* v. *Watt*, 3 Ves. 244.
(*r*) *Tudor* v. *Anson*, 2 Ves. Sr. 582.
(*s*) *Watts* v. *Bullas*, 1 P. Wms. 60.
(*t*) *Chetwynd* v. *Morgan*, 31 Ch. Div. 596.

executing the power by will, when the execution should have been by deed (*u*): But, conversely, if the power was to be executed by will only, and it was executed by deed, no relief would have been granted (*x*): Nor would equity have aided, where the power was executed without the consent of the persons required to consent to its execution (*y*).

Powers in the nature of trusts,—execution of.

It is necessary to distinguish, of course, between mere powers and powers in the nature of trusts,—powers in the nature of trusts being as obligatory upon the conscience as actual trusts themselves: That is to say, If a man is invested with a trust, *to be effected by the execution of a power*, his execution of the power is imperative; and if he refuse to execute it (or die without having executed it), equity interposes to give the suitable relief (*z*).

(c) Accidents in payments by executors or administrators,—relief, in cases of.

(C) *Erroneous Payments.*—In the course of the administration of estates, executors and administrators often pay debts and legacies, upon a well-founded belief, that the assets are sufficient for all purposes; but afterwards (from unexpected occurrences, or from unsuspected debts and claims coming to light), there proves to be an insufficiency of assets to pay the debts,—much less, the legacies: Now, in such a case, the executors were entitled to no relief at law; but if they had acted in good faith and with due caution, they were entitled to be relieved in equity: For example, if the goods of the testator had been stolen, the executor would not in equity have been charged with these (*a*); and if goods of a perishable nature had depreciated without any default in the executor, he was not in equity required to answer their original value (*b*); and that is the view which is now accepted in Courts of law also, regarding the executor's position (*c*). But the executor would not have been per-

(*u*) *Tollett* v. *Tollett*, 2 P. Wms. 489.
(*x*) *Adney* v. *Field*, Amb. 654.
(*y*) *Mansell* v. *Mansell*, 2 Bro. C. C. 450.
(*z*) *Brown* v. *Higgs*, 8 Ves. 574.
(*a*) *Jones* v. *Lewis*, 2 Ves. Sr. 240.
(*b*) *Clough* v. *Bond*, 3 My. & Cr. 496.
(*c*) *Job* v. *Job*, 6 Ch. Div. 562.

mitted to call that an accident, which was attributable to some neglect on his part,—or which was a mistake of law on his part: For example, if an executor distributes the residuary estate on a wrong principle of law, he will be answerable (although his mistake is one purely of law (*d*)); and similarly, if the theft or the depreciation has arisen from (or has been facilitated by) the executor's neglect of duty.

(D) *Non-Relievable Accidents.*—In matters of positive contract, equity would not give relief,—it being no ground for the interference of equity, that the party has been prevented by accident from fulfilling his contract: For example, if a lessee covenants to pay rent, or covenants to repair,—which duty of repairing may (and usually will) extend to rebuilding,—he will be bound (in equity, as well as at law) to pay the rent or to do the repairs, notwithstanding the destruction of the premises by fire, earthquake or other inevitable accident (*e*),—*Scil.*, because he might (by his contract) have provided for such contingencies, and the law will otherwise presume an absolute liability: Nor will the payment of the rent be suspended even, during the period of the rebuilding (*f*),—unless the contract should so provide: And what is above stated as applicable between lessors and lessees, is (in substance) applicable also as between vendors and vendees,—the maxim (or rule) being, "*Res perit domino*" (*g*). But the hardship on the lessee or purchaser is (in such cases) apparent rather than real,—Because, of course, the lessee (or purchaser) can always (at a trifling cost) insure himself against the loss by fire or earthquake; and the insurance might be (and usually is) made to extend (in the case of leases at a rent) to include also the rent payable during the period of the rebuilding.

(D) Cases where equity will not give relief:

(1) Lessors and lessees,—

(1a) Vendors and vendees.

But note, that where the duty is imposed by the law (and not by the contract of the parties), and the duty is

(2) Absolute obligations,—when dis-

(*d*) *Hilliard* v. *Fulford*, 4 Ch. Div. 389.
(*e*) *Pym* v. *Blackburn*, 3 Ves. 38.
(*f*) *Leeds* v. *Cheetham*, 1 Sim. 150.
(*g*) *Paine* v. *Meller*, 6 Ves. 349 (*fire*); *Cass* v. *Rudel*, 2 Vern. 280 (*earthquake*); *Barr* v. *Gibson*, 3 Mee. & W. 390 (*deterioration*).

charged for the future, although good for the past.

(or becomes) impossible of fulfilment, *through no fault of the party*,—In such a case, the duty will be discharged even at law, and no suit in equity for relief therefrom was ever necessary: That is to say, the obligation, although it should be *absolute* in terms, will be taken to have proceeded upon a basis which has since become *non-existent*, —Whereby both the parties are discharged in respect of the future, all past payments, however, remaining and continuing good (*h*).

(3) Contracts, where parties are equally improvident against contingencies.

Equity would not (nor will) give relief, where the parties are equally innocent,—that is to say, have been *equally improvident against contingencies*: For example, if there is a contract to sell at a price to be fixed by an award during the life of the parties; and one of the parties dies before the award is made,—The contract fails, and equity will not enforce it upon the ground of accident (*i*). Or, if there is a contract to sell goods at a price which (by the agreement of the parties) shall be fixed by A. B.; and either A. B. dies without having fixed the price, or refuses to fix it, or becomes incapable of fixing it,—In either or any of these cases, the contract becomes void, and will not be performed in equity. However, the cases lastly above exemplified are not to be confounded with cases in which the parties (to a submission to arbitration) have agreed that the award shall be made within a time specified in the submission,—For the Court may extend the time for making the award (*k*).

(4) Where party, claiming relief, has been guilty of gross negligence.

Equity will, of course, grant no relief to a party (upon the ground of accident), where the accident has arisen from his own gross fault,—*Scil.*, because, in such a case, there is in fact no accident properly so called.

(5) Where party claiming relief has no vested right, but only a probability of a right.

Nor will equity interpose upon the ground of accident, where the claim rests in mere expectancy or volition; and, for example, if a testator intended to make a will in favour of A. or B. or C., and is prevented by accident from

(*h*) *Krell* v. *Henry*, 1903, 2 K. B. 740, 756, 760 *n*.
(*i*) *White* v. *Nutts*, 1 P. Wms. 61.
(*k*) *Lord* v. *Lee*, L. R. 3 Q. B. 404.

doing so, the legatee or devisee (being a mere volunteer) shall have no relief (*l*).

Lastly, equity will not interpose (on the ground of accident), where the other party stands upon an equal equity, and is entitled to equal protection,—as (*e.g.*) in the case of a *bonâ fide* purchaser for valuable consideration without notice (*m*). (6) Equity will not aid one party, where the other party has an equal equity.

(*l*) *Whitton* v. *Russell*, 1 Atk. 448.
(*m*) *Malden* v. *Menill*, 2 Atk. 8.

CHAPTER II.

MISTAKE.

Mistake.

AT law, a mistake which is apparent on the face of the document itself will simply be corrected (*a*); and there is, in such a case, no occasion for coming into equity. The mistakes which are fit for equity are of a much more complicated character, involving, usually, questions of construction, questions of conduct, &c., &c.; and generally, the mistake may be either (1) Mistake of *law*, or (2) Mistake of *fact*.

I. Mistake of law,—as a general rule, not relievable.

I. *Mistake of Law*:—Although ignorance of the law is no excuse (*Ignorantia legis neminem excusat*), still money paid under a mistake of *law* may be recovered back, wherever it is inequitable for the defendant to keep the money (*b*): And, therefore, money paid to an officer of the Court (under this kind of mistake) may always be recovered back (*c*); and money paid (or credited as paid), in settlement of the claim in an action, and *under legal compulsion* even, may be recovered back, *where the recipient knew of the mistake at the time and received the money* malâ fide (*d*).

An agreement under a mistake of law binding, where the law must be taken to have been known.

In the absence, however, of any such equity, the rule of law will prevail; and an agreement entered into in good faith, although under a mistake of law, will be obligatory (both at law and in equity): For example, an agreement, whereby the forfeiture of a devise is waived, will be good,—*Scil.*, if deliberately entered into, the parties *having the very will itself out of which the forfeiture arises before them*, while the drafts are preparing; and

(*a*) *Burchell* v. *Clark*, 2 C. P. D. 88.
(*b*) *Rogers* v. *Ingham*, 3 Ch. Div. 351.
(*c*) *Dixon* v. *Brown*, 32 Ch. Div. 597.
(*d*) *Ward* v. *Wallis*, 1900, 1 Q. B. 675.

they shall not in such a case be relieved on any ground of surprise (*e*): That is to say, in order to obtain relief against a mistake of law, there must (in the general case) have been either imposition or surprise: For example, if an eldest son (and heir-at-law), knowing that he was the eldest son, *but too ignorant to know that he was therefore also heir-at-law*, should agree to divide the estate with his younger brother, a Court of Equity would relieve, upon the *presumption of some imposition practised* (*f*); and the Court is in the daily habit of relieving (on the ground of *surprise*) against agreements which are absolutely ill-advised and improvident (*g*); and relief will also be given against agreements entered into under the pressure of *trumped up and unreal* difficulties (*h*).

Ignorance of a plain and well-known principle of law,—relieved against.

On the other hand, a compromise which has been fairly entered into, with due deliberation and full knowledge, will be upheld in a Court of Equity, equally as in a Court of law; and the knowledge of the plaintiff's solicitor will, in general, be imputable to the plaintiff (*i*),—Unless where it is shown, that the solicitor has misled the client (*k*). And, in particular, in the case of family agreements,—If these have been entered into without concealment or imposition on either side,—each of the parties investigating the subject for himself, and each communicating to the other all he knows,—The Court will hold the parties to their agreement, even although they may have greatly mistaken their rights (*l*),—and whether the doubtful point was matter of fact or of law (*m*),—and even where there was no doubtful point at all (*n*).

Compromises,—upheld, where a doubtful point of law or of fact, and a full disclosure.

But, in order that such family agreements (or arrangements) may be supported, there must have been a full and fair communication of all the material circumstances

(*e*) *Pullen* v. *Ready*, 2 Atk. 591—per Lord Hardwicke.
(*f*) *Pusey* v. *Desbouverie*, 3 P. Wms. 315.
(*g*) *Cochrane* v. *Willis*, L. R. 1 Ch. App. 58.
(*h*) *Reynell* v. *Sprye*, 8 Ha. 227.
(*i*) *Stewart* v. *Stewart*, 6 Cl. & F. 911.
(*k*) *Roberts* v. *Roberts*, 1905, 1 Ch. 704.
(*l*) *Gordon* v. *Gordon*, 3 Swanst. 463.
(*m*) *Neale* v. *Neale*, 1 Kee. 672.
(*n*) *Williams* v. *Williams*, L. R. 2 Ch. App. 294.

within the knowledge of the parties (*o*),—*Because, without full disclosure, honest intention is not sufficient* (*p*): And, *a fortiori,* if the concealment of any material circumstance has been fraudulent, the Court will set aside the compromise, even where the Court itself has sanctioned it (*q*), the most solemn decree of the Court being always liable to be opened on the ground of fraud (*r*).

Equity will not aid, where position of parties has been altered; or against a *bonâ fide* purchaser.

The disinclination of equity to set aside a family compromise (entered into *bonâ fide*) will be strengthened, where subsequent arrangements have been made on the footing of the compromise (*s*); and, more particularly, where a *bonâ fide* purchaser for value is concerned, equity will not grant relief (*t*). It must be remembered, however, that (in the case of a family arrangement between a father and his son) the solicitor for the father, if he is also a mortgagee of the father, runs great risk, if he get the father and the son to execute (*e.g.*) a disentailing deed,—and to thereupon liquidate the father's mortgage, although at a reduced rate of interest, and although the terms are otherwise beneficial to both father and son: And in one case of that sort, *and after twelve years' delay,* the son succeeded in setting aside the arrangement (and with costs) against the solicitor (mortgagee of the father),—*Scil.*, because no independent solicitor had been employed by the son (*u*).

Common solicitor of father and son,—ticklish position of, on a compromise.

Relief, by consent, on equitable terms.

Where, in any case, the mistake of law is merely one as to the true construction of a document,—and all parties acknowledge the mistake, and submit to its correction, upon terms consonant with equity,—For example, where (in a conveyance) one particular tenement is by all parties supposed not to have been included, and it is afterwards found to have been included, but money has meanwhile been expended on the tenement, in the belief that it was

(*o*) *Greenwood* v. *Greenwood*, 2 De G. J. & Sm. 28.
(*p*) *De Cordova* v. *De Cordova*, 4 App. Ca. 692.
(*q*) *Brooke* v. *Ld. Mostyn*, 2 De G. J. & Sm. 373.
(*r*) *Patch* v. *Ward*, L. R. 3 Ch. App. 203.
(*s*) *Persse* v. *Persse*, 7 Cl. & F. 318.
(*t*) *Malden* v. *Menill*, 2 Atk. 8.
(*u*) *Savery* v. *King*, 5 H. L. Ca. 627.

not included,—The Court will (by consent) relieve, the interim expenditure being recouped to the party (*x*),—and in such a case, the distinction between mistake of law and mistake of fact (as above has been observed) is not regarded (*y*).

Mistake,—being merely an ambiguity of construction.

Where, in any case, the so-called mistake (whether of law or of fact) is not a mistake at all, but is a mere *ambiguity*, in the document,—For example, if there is a deed of release, wherein the general words of release extend to include rights debts and other things which were not in contemplation at all,—The Court will simply construe the deed,—and (construing the general words *restrictively*) will hold the release to extend only to such rights, and to such debts, and to such other things as were in contemplation (*z*).

II. Mistake of fact,—as a general rule relievable.

(1) Fact must be material,—whether the mistake be of one only, or of both, of the parties.

II. *Mistakes of Fact*:—An act done under a mistake of fact is relievable in equity,—assuming the fact to be material,—and the relief will only vary according as the mistake is unilateral or is mutual: If, therefore, any one should sell a messuage to another, which was at the time swept away by a flood (*a*),—or if any one should purchase an annuity during the life of A. B., and A. B. was then already dead (*b*),—without either party having any knowledge of the fact,—Equity would relieve the purchaser, upon the ground, that both parties intended the purchase and sale of a subsisting thing, and implied its existence as the basis of their contract. And (on the same principle) a contract to purchase property which is already the purchaser's own, is relievable,—and that, whether the mistake is of the purchaser only, or is the mistake of both the parties (*c*), and although the Court may itself have sanctioned the agreement (*d*). And relief will also be given, where the purchase is of a reversion, and the reversion

(*x*) *Cooper* v. *Phibbs*, L. R. 2 H. L. 149.
(*y*) *Daniel* v. *Sinclair*, 6 App. Ca. 180.
(*z*) *Turner* v. *Turner*, 14 Ch. D. 829.
(*a*) *Hore* v. *Becher*, 12 Sim. 465.
(*b*) *Strickland* v. *Turner*, 7 Exch. 208.
(*c*) *Bingham* v. *Bingham*, 1 Ves. Sr. 126.
(*d*) *Brooke* v. *Ld. Mostyn*, 2 De G. J. & Sm. 373.

has already (at the date of the purchase) fallen into possession (*e*); or where the purchase is of a life-policy, and the life is already (at the date of the purchase) dead (*f*).

(2) Party having knowledge must have been under an obligation to discover the fact.

However, even in cases where the fact is material, it must, in general, be also shown, that the fact is one which could not by reasonable diligence have been known; and if (by reasonable diligence) it might have been known, equity will not relieve (*g*),—or will only occasionally relieve (*h*),—the means of knowing a thing and the actual knowledge of it being two very different things, and "*forgetfulness*" being excusable sometimes (*i*). But, as a general rule, where the means of information are equally open to both, and each is presumed to exercise (and does also exercise) his own judgment with regard to the subject-matter, equity will not relieve. Also, where a particular material fact is equally unknown to both, and where (to the knowledge of both) the fact is from its very nature doubtful,—In every such case, if the parties have acted with entire good faith, a Court of equity will not relieve (*k*).

Oral evidence admissible to prove accident mistake or fraud.

Oral evidence is not, in general, admissible to contradict (alter or vary) a written agreement; but you may always use it, to show, that (either by accident mistake or fraud) the written agreement mis-states the true intention of the parties,—*Scil.*, because to enforce an agreement under such circumstances, would be the highest injustice (*l*): Where, therefore, an instrument *inter vivos* is (by mistake) not what the parties intended, equity will rectify the instrument,—and in so doing, the Court is in no way running counter to the Statute of Frauds (*m*).

Mistake implied from nature of the case.

Equity will also relieve, *when the mistake is evident from the nature of the case*,—and will (*e.g.*), occasionally,

(*e*) *Colyer* v. *Clay*, 7 Beav. 188.
(*f*) *Scott* v. *Coulson*, 1903, 2 Ch. 249.
(*g*) *Canada Bank* v. *Bank of Hamilton*, 1903, A. C. 49.
(*h*) *Hood* v. *Mackinnon*, 1909, 1 Ch. 476.
(*i*) *Kelly* v. *Solari*, 9 Mee. & W. 54.
(*k*) *Mortimer* v. *Capper*, 1 Bro. C. C. 156.
(*l*) *Murray* v. *Parker*, 19 Beav. 308.
(*m*) *Johnson* v. *Bragge*, 1901, 1 Ch. 28.

treat a joint obligation as a joint and several one,—as in the case of a partnership debt (which is a mere joint debt, but which, *as between the partners,* is the several debt of each),—*the obligation* (in such a case) *already existing* (*as between the partners*) *independently of the instrument by which the debt has been subsequently secured or evidenced.* But where there is no such pre-existing several liability (*n*), equity will not treat the joint obligation as several,—Because *when the obligation exists only by virtue of the "covenant," its extent can be measured only by the words of the "covenant"* (*o*); and a joint obligation is, usually, a joint obligation,—and is not (as a matter of course) to be deemed several in equity,—a joint covenant being (in many cases) the only proper covenant (*p*).

Remedy for mistake of fact,—(1) When mistake is *unilateral.*

Mistakes of fact are either unilateral or mutual: And, Firstly, when the mistake is unilateral, and the contract has been completed by the due conveyance, the plaintiff cannot have *rectification*,—still less can he have *rescission*,—Unless where it would be a FRAUD in the defendant,—whether in the case of a sale (*q*) or in the case of a lease (*r*),—to retain the advantage of the mistake; or unless where the mistake of the plaintiff has been *induced* by the conduct of the defendant (*s*).

(2) When mistake is *mutual.*

Rectification or rescission,—option, occasionally, given to defendant between.

But, Secondly, when the mistake is mutual, *rectification* is of right,—unless where the plaintiff has by his own laches lost that right: But the Court will sometimes give the defendant the option of having rectification or else of submitting to rescission (*t*); and, of course, the relief given (whether rectification or rescission) is equitable relief,—and is therefore only given upon terms (*u*).

Laches,—where and where not imputable, and effect of.

A plaintiff will not be guilty of laches,—so as to lose his right to rectification,—unless he is proved to

(*n*) *Sumner* v. *Powell*, 2 Mer. 36.
(*o*) *Rawstone* v. *Parr*, 3 Russ. 539.
(*p*) *White* v. *Tyndall*, 13 App. Ca. 263.
(*q*) *May* v. *Platt*, 1900, 1 Ch. 616.
(*r*) *Angel* v. *Jay*, 1911, 1 K. B. 666.
(*s*) *Wilding* v. *Sanderson*, 1897, 2 Ch. 534.
(*t*) *Paget* v. *Marshall*, 28 Ch. D. 255.
(*u*) *Sutherland* v. *Heathcote*, 1892, 1 Ch. 475.

have (for a long time) known of the mistake; but as between a vendor and a purchaser, the purchaser is deemed to know (*x*), although the vendor is not deemed to know (*y*), what is included in the conveyance whereby the purchase-agreement was completed:

Relief,—how given.

And here it may be convenient to mention, firstly, that where the relief is rectification, you merely indorse the order on the conveyance itself which is rectified thereby (*z*); and, secondly, that, occasionally, the contract itself may (in the case of mutual mistake) be rectified, and (as rectified) specifically enforced in one and the same action (*a*); and, thirdly, that a deed which has been cancelled under a mistake may be (in effect) set up again by a Court of Equity (*b*).

Mistakes in marriage settlements.

The rectification of a document is less difficult, where the mistake is made out by some other (preliminary) document; and with reference to marriage settlements (following upon marriage articles), the following distinctions have been made, namely:—

(a) Both marriage articles and settlement before marriage.

(1) When both the marriage articles and the marriage settlement are entered into *before* the marriage, if the articles and the settlement vary in their terms, the settlement will be considered the binding instrument,—*Scil.*, Because, *all parties being at liberty,* the settlement will be taken as a new agreement (*c*),—Although, even in that case, *if the settlement purports to be made in* PURSUANCE *of the articles* (*d*) (or if it can be shown, that the settlement must, although not so expressed, have been INTENDED *to pursue the articles* (*e*)), the Court will (in either of these cases) make the settlement conformable to the articles. But

(b) Settlement after marriage.

(2) When the settlement is made *after* the marriage, it will, in all cases, be controlled by the marriage articles, —and rectified accordingly (*f*).

(*x*) *Beale* v. *Kyte*, 1907, 1 Ch. 564.
(*y*) *Bloomer* v. *Spittle*, L. R. 13 Eq. 427.
(*z*) *Stock* v. *Ivimey*, 25 Beav. 235.
(*a*) *Olley* v. *Fisher*, 34 Ch. D. 367.
(*b*) *East India Co.* v. *Donald*, 9 Ves. 275.
(*c*) *Legg* v. *Goldwire*, Ca. t. Talb. 20.
(*d*) *West* v. *Erisey*, 1 Bro. P. C. 225.
(*e*) *Bold* v. *Hutchinson*, 4 De G. M. & G. 568.
(*f*) *Mignan* v. *Parry*, 31 Beav. 211.

And (3) The true contract of the parties will in no case be varied or altered,—So that (*e.g.*) the erroneous belief by the husband and wife on their marriage, that a particular property stood settled, will be no ground for rectifying the settlement so as to make it include that property (*g*).

And (4) The Court cannot, *semble*, correct a marriage settlement, unless where *all* the parties interested thereunder acknowledge the mistake (*h*), and request its correction (*i*),—although (save and except in the case of marriage contracts (*k*) (including divorce agreements (*l*)), the mistake need not be (and usually is not) that of *both* or *all* the parties.

And here note, that a *voluntary* deed (or gift by deed) will not be reformed or rectified,—being either good altogether, or else bad altogether (*m*).

Mistakes in wills.

As regards *wills*, if the mistake is evidently a mere *lacuna* (*i.e.*, a manifest omission), equity will (*as a matter of interpretation*) supply the omission (*n*),—and so, in other cases also of a mistake which is plain on the face itself of the will (*o*); but evidence *dehors* the will is not admissible to prove the mistake (*p*).

(a) Mere misdescription of legatee will not defeat legacy, unless legacy obtained by a false personation.

A mere misdescription of the legatee will not defeat the legacy: But where a legacy is given to a person under a particular character, *which he has falsely assumed and which was the alone motive of the gift*, he cannot demand his legacy (*q*); and where a woman gave a legacy to her husband,—when, in point of fact, he was not her husband (having had a former wife living at the date of his marriage with the testatrix),—the bequest was held void (*r*). But, in a comparatively recent case (*s*), where

(*g*) *Barrow* v. *Barrow*, 18 Beav. 529.
(*h*) *Fowler* v. *Fowler*, 4 De G. & J. 250.
(*i*) *Sells* v. *Sells*, 1 Dr. & Sm. 45.
(*k*) *Bradford* v. *Romney*, 30 Beav. 431.
(*l*) *Allcard* v. *Walker*, 1896, 2 Ch. 369.
(*m*) *Phillipson* v. *Kerry*, 32 Beav. 623.
(*n*) *Redfern* v. *Bryning*, 6 Ch. D. 133.
(*o*) *Key* v. *Key*, 4 De G. M. & G. 84.
(*p*) *Miller* v. *Daintree*, 33 Ch. Div. 198.
(*q*) *Giles* v. *Giles*, 1 Keen, 692.
(*r*) *Kennell* v. *Abbott*, 4 Ves. 808.
(*s*) *Allen* v. *M'Pherson*, 1 H. L. C. 191.

Semble, the objection to the bequest must now be taken in the Probate Division.

a testator gave all his property to his wife, and appointed her his sole executrix; and she was not his wife,—having had (at the date of her marriage with the testator) a former husband living,—The Court of Chancery declined jurisdiction, upon the ground that the matter was one for the Court of Probate,—a decision which cuts away altogether the jurisdiction of the Chancery Division in this class of mistakes, and obliges litigants to take the objection in the Probate Division,—excepting where the matter is purely one of the true interpretation (or construction) of the will (*t*).

(b) Revocation of legacy on a mistake of facts.

Where a legacy has been revoked under a mistake of fact, equity could give relief,—and if a testator revoked (*e.g.*) legacies to A. and B., giving as a reason that they were dead, and they were in fact living,—equity used to hold the revocation invalid, and to decree the legacies (*u*): Also, a false reason given for a legacy will be no ground for avoiding it in equity (*x*); nor will the expressed motive (*y*) or the expressed object (*z*) of the legacy matter in the general case,—although, occasionally it will (*a*). Also, where a testator gave a pecuniary legacy, and directed that a specified sum (*which he stated he had already advanced to the legatee*) was to be deducted from the amount of the legacy, the legatee was held to be bound by the amount of the advance as stated,—and was not at liberty to adduce evidence to show, that the amount of the actual advance was in fact less (*b*): But if the words of the will are at all ambiguous, as to the specified advance (*c*),—or can be explained otherwise in any reasonable way (*d*),—that very harsh mode of interpreting the bequest may, occasionally, be got rid of.

Relief,—when, and to what extent,

The remedial powers of the Court do not extend to supplying any circumstance, the want of which makes the

(*t*) *Wagstaff* v. *Jalland*, 1908, 1 Ch. 162.
(*u*) *Campbell* v. *French*, 3 Ves. 321.
(*x*) *Boddington* v. *Clairat*, 25 Ch. Div. 685.
(*y*) *Mills* v. *Johnston*, 1894, 3 Ch. 204.
(*z*) *Knox* v. *Ld. Hotham*, 15 Sim. 82.
(*a*) *Yates* v. *University College*, L. R. 7 H. L. on p. 443.
(*b*) *In re Aird's Estate*, 12 Ch. Div. 291.
(*c*) *Ziegler* v. *Nicol*, 1906, 2 Ch. 301.
(*d*) *Kelsey* v. *Kelsey*, 1905, 2 Ch. 465.

instrument void by statute: But the Court will endeavour to give relief, even although the relief may (*primâ facie*) appear to be against the statute,—For example, the Court will rectify (on the ground of mistake) a deed of re-settlement, although the deed has been enrolled as a disentailing assurance (*e*),—*Scil.*, Because the 3 & 4 Will. IV. c. 74, when it excludes (by s. 47) the jurisdiction of equity, excludes it *only so far as regards the destruction of the entail*, and no further. On the other hand, an agreement to levy a fine or to suffer a common recovery, was not (and a contract to execute a disentailing deed is not) enforceable in equity (even in favour of a purchaser for value),—but may only be enforced as against the contracting party himself (*f*), or his bankruptcy trustee (*g*). excluded by statute?

And here these two further points may conveniently be mentioned, namely, (1) That in the case of a *remedial* statute, although the words of the statute should be ever so large, the Court will limit the relief to what is reasonable (*h*); and (2) that you need not always come into equity, for the relief provided by a statute,—because sometimes the statute itself supplies some specific remedy of a preferable character (*i*).

(*e*) *Hall-Dare* v. *Hall-Dare*, 31 Ch. Div. 251.
(*f*) *Banks* v. *Small*, 36 Ch. Div. 716.
(*g*) *Pye* v. *Daubuz*, 3 Bro. C. C. 595.
(*h*) *Jones* v. *Barnett*, 1899, 1 Ch. 611.
(*i*) *Evans* v. *Chapman*, 1902, W. N. 78.

CHAPTER III.

ACTUAL FRAUD.

Difficulty of defining fraud.

EQUITY always had *concurrent* jurisdiction in fraud,—and exercised also (in certain cases and for certain purposes) an *exclusive* jurisdiction: That is to say, a matter might not have been a fraud at all (*Scil.*, in the view of a Court of law, and for the purposes of legal relief (*a*)), and yet might have been a fraud in equity (*Scil.*, for the purposes of equitable relief (*b*)).

Actual fraud —varieties of.

Fraud is either (1) *Actual* fraud or (2) *Constructive* fraud,—and actual fraud may consist either (A) In misrepresentation or (B) In concealment.

(*A*) *Misrepresentation.*

(A.) MISREPRESENTATION (otherwise called *Suggestio Falsi*), is, where a party intentionally misrepresents a material fact,—and so produces a false impression; and if the party to whom the misrepresentation is made (*c*), —or any third person who (it was intended) *should act upon the misrepresentation* (*d*),—acts upon it to his damage, the other party shall be liable for that damage (*c*). And the misrepresentation will amount to a fraud, not only where it is known to be false by those who make it, but also (at least, for some purposes) where it is made by persons who do not know it to be either true or false, and yet make it,—or who believe it to be true, when (in the due discharge of their duty) they ought to have known, and to have remembered, the fact which negatives its truth (*e*).

(*a*) *Hoare* v. *Bremridge*, L. R. 8 Ch. App. 22.
(*b*) *Redgrave* v. *Hurd*, 20 Ch. D. 1, on pp. 12, 13.
(*c*) *Angus* v. *Clifford*, 1891, 2 Ch. 449.
(*d*) *Andrews* v. *Mockford*, 1896, 1 Q. B. 372.
(*e*) *Barry* v. *Crosskey*, 2 J. & H. 1.

The misrepresentation must be of a *material* fact,—*Fraus dans locum contractui*,—That is to say, it must be the misrepresentation of some fact which gives occasion to the contract; and a mere intention will sometimes amount to a material fact within the meaning of this rule (*f*). Also, the misrepresentation must, usually, be of something in regard to which the one party places confidence in the other,—as where the vendor has done something which leads the purchaser to abstain from properly inquiring for himself (*g*). But mere puffing will not, usually, amount to a fraud,—*Simplex commendatio non obligat;* and in a matter of mere opinion, *each party must be taken to have relied on his own judgment* (*h*). Also, if the party to whom the misrepresentation is made is not misled by it,—or knows it to be false,—or assumes to inquire (and also inquires for himself (*i*)),—there is no fraud.

Fact must be material;

and must have been relied on.

If the misrepresentation is merely "*ambiguous*," the party complaining of it as a fraud must show the sense in which he understood it (*k*); but, under the Companies Act, 1908 (*l*), s. 215, re-enacting or continuing the like provisions of the Directors' Liability Act, 1890 (*m*), and the Companies Acts, 1900 and 1907 (*n*), as regards any apparent misrepresentation (in prospectuses and the like), the *primâ facie* presumption is against the directors, and the onus is therefore on *them* to justify the statements contained therein.

Generally, in respect of misrepresentations made by the directors of companies,—The company is responsible for the damage *to the extent of the profits it has made thereby;* and otherwise the remedy is against the directors personally (*o*). Also, the directors are jointly and

Misrepresentations of directors.

(*f*) *Edgington* v. *Fitzmaurice*, 29 Ch. Div. 459.
(*g*) *Denny* v. *Hancock*, L. R. 6 Ch. App. 1.
(*h*) *Smith* v. *Land and House*, 28 Ch. Div. 7.
(*i*) *Attwood* v. *Small*, 6 Cl. & F. 232.
(*k*) *Smith* v. *Chadwick*, 9 App. Ca. 187.
(*l*) 8 Edw. VII. c. 69.
(*m*) 53 & 54 Vict. c. 64, s. 3.
(*n*) 63 & 64 Vict. c. 48, s. 10; 7 Edw. VII. c. 50, s. 1.
(*o*) *Barwick* v. *English Joint Stock Bank*, L. R. 2 Exch. 259.

severally liable; and the action may, therefore, be brought against one or more of them alone, without the other or others (*p*): But where and so far as the action is for a tort, no action lies against the executor of a deceased fraudulent director,—*unless to the extent (if any) that his estate has profited by the fraud* (*q*): However, where the proceedings against the directors were under the Directors' Liability Act, 1890, the liability was for *compensation* (*r*),—with a right (in the directors) to contribution *inter se* (*s*),—and so, now, under the Companies Act, 1908, s. 84. But apart from the specific provisions of the Companies Acts (1862—1907), a director was not liable (*Scil.*, in an action of "*deceit*"), unless he had been guilty of "*fraud*" (*t*): That is to say, "*negligence*" alone (how much soever culpable) did not suffice (*u*).

Remedy, where misrepresentation can be made good,—and where it cannot.

Innocent beneficiaries,—may lose their benefits under the fraudulent instrument.

Where a contract has been induced by a material misrepresentation, the fraudulent contractor is compellable to make it good, if it can be made good; and otherwise the other contracting party may avoid the contract (*x*): Also, no one can keep a profit obtained by the fraud of another, unless he himself is free from the fraud and has given valuable consideration,—That is to say, the fraud vitiates the deed *in toto*,—so that the beneficiaries entitled under it lose,—in general (*y*), but not invariably (*z*),—their beneficial interests, even where they are themselves wholly innocent of the fraud: In other words, B., although innocent of the fraud of A., cannot (in general) retain any benefit under a deed which has been procured by the fraud of A. (*a*),—*Scil.*, unless B. is a purchaser for value: Also, the doctrine of "*the estate feeding the estoppel*," is inapplicable to a case, where the estate is procured through a fraud (*b*).

(*p*) *Parker* v. *Lewis*, L. R. 8 Ch. App. 1035.
(*q*) *Peek* v. *Gurney*, L. R. 6 H. L 377.
(*r*) *Thomson* v. *Lord Clanmorris*, 1900, 1 Ch. 718.
(*s*) *Gerson* v. *Simpson*, 1903, 2 K. B. 197.
(*t*) *Angus* v. *Clifford*, 1891, 2 Ch. 449.
(*u*) *Derry* v. *Peek*, 14 App. Ca. 337.
(*x*) *Newbigging* v. *Adam*, 13 App. Ca. 308.
(*y*) *Bennet* v. *Wade*, 1 Dick. 84.
(*z*) *Barrow* v. *Barrow*, 2 Dick. 504.
(*a*) *Huguenin* v. *Baseley*, 14 Ves. 273.
(*b*) *Heath* v. *Crealock*, L. R. 10 Ch. App. 22.

Fraud,—affirmance of.

If a party who has been defrauded, after having full knowledge of the fraud, continues to deal with the party who has defrauded him, he will be taken to have released the fraud (*c*),—*Scil.*, unless where the fraud happens to be a continuing fraud (*d*): And if (having the means of knowledge) he compromises the matter, there again he is taken to have released the fraud (*e*),—Because, generally, in the case of every *civil* fraud, you may (at your option) either affirm the fraud (*f*), or disaffirm it (*g*),—and if you choose to affirm the fraud, the fraud is "*purged*" (*h*).

Damages recovered on rescission,—following on damages for deceit.

And here it is to be noticed, that if a company (or, in fact, anyone) purchases property through an agent to make the purchase,—and the agent buys at one price for himself, and then sells at a higher price to his principal (whether company or individual),—The principal (affirming the purchase) may not only keep the property purchased, but also recover from the agent the difference between the two prices (*i*): *Secus*, if the agent was not, in fact, the agent (*k*): And it is to be further remembered here, that the action of "*deceit*" for damages leaves the fraud *unaffirmed*,—So that the plaintiff may (after recovering damages for the "*deceit*") commence a further action for "*rescission*"; and in such further action, he recovers back his deposit (or other money paid), and gets also an indemnity and his costs (*l*).

(*B*) *Concealment.*

(2) CONCEALMENT (otherwise called *Suppressio Veri*), is the suppression or withholding of some material fact, *being some fact which the one party was under a legal duty to the other to disclose* (*m*),—So that, where there is no such duty, the mere concealment is not a fraud (*n*): And, as between vendors and purchasers, whether of real estate or of personal estate, the purchaser is (in general)

(*c*) *Mitchell* v. *Homfray*, 8 Q. B. D. 587.
(*d*) *Moxon* v. *Payne*, L. R. 8 Ch. App. 881.
(*e*) *Law* v. *Law*, 1905, 1 Ch. 140.
(*f*) *Hemmings* v. *Sceptre Life Insurance*, 1905, 1 Ch. 365.
(*g*) *In re Eastgate*, 1905, 1 K. B. 465.
(*h*) *Ormes* v. *Beadel*, 2 De G. F. & J. 333.
(*i*) *Bagnall* v. *Carlton*, 6 Ch. D. 371.
(*k*) *Burland* v. *Earle*, 1902, A. C. 83.
(*l*) *Rawlins* v. *Wickham*, 3 De G. & J. 304.
(*m*) *Turner* v. *Green*, 1895, 2 Ch. 206.
(*n*) *Keates* v. *Cadogan*, 10 C. B. 591.

under no legal duty to the vendor (*o*): But the vendor is under a legal duty to him,—and, therefore, if he should sell an estate, knowing that there were incumbrances (*p*) or party-wall or easements (*q*) on it of which the purchaser was ignorant, the suppression would avoid the sale (*p*). And the purchaser also,—but under exceptional circumstances only,—may come under the duty of making full disclosure,—For example, where a property is being sold under the direction of the Court, and the purchaser lays information before the Court on any particular point (in order to procure the sanction of the Court to the sale), he must lay before the Court all the information he possesses (that is material on that particular point), in order to enable the Court to form a correct opinion (*r*). Also, if the purchaser should "*hustle*" a vendor (or a lessor), into a sale (or into a lease) of the property, that will avoid the sale (or lease (*s*)). Usually, however, in a sale of personal chattels, the maxim *caveat emptor* is applicable,—So that neither the purchaser nor the vendor will be under any duty of disclosure to the other,—or liable for concealment (*Nam qui tacet, non videtur affirmare*), —Upon the supposition always (as regards the vendor), that he has not made any representation which averts inquiry (*t*),—or been guilty of (what has sometimes been called) "*aggressive concealment*" or "*industrious concealment*" (*u*).

Duty of purchaser, on a sale by the Court, upon his undertaking to give the Court information.

"Hustling," —effect of.

As to intrinsic defect in personal chattels, *caveat emptor*.

Occasionally, also, the silence of the party is deemed equivalent to his direct affirmation,—For example, in the case of an insurance, the insured is bound to communicate to the insurer all the facts and circumstances (material to the risk) that are within his knowledge; and if these are withheld (*whether the concealment be by design or by accident*), it is equally a fraud, and fatal to the contract (*x*): And as regards life assurances in particular, matters of opinion even,—as to (*e.g.*) whether the intend-

Silence sometimes tantamount to direct affirmation.

(*o*) *Fox* v. *Mackreth*, 2 Bro. C C. 420.
(*p*) *Edwards* v. *M'Leay*, 2 Swanst. 287.
(*q*) *Carlish* v. *Salt*, 1906, 1 Ch. 335.
(*r*) *Boswell* v. *Coaks*, 11 App. Ca. 232.
(*s*) *Walters* v. *Morgan*, 3 De G. F. & J. 718.
(*t*) *Porter* v. *Moore*, 1904, 2 Ch. 367.
(*u*) *Edwards-Moss* v. *Marjoribanks*, 7 H. L. Ca. 806.
(*x*) *London Assurance Co.* v. *Mansel*, 11 Ch. Div. 363.

ing assured is of temperate habits,—are really matters of fact (*y*),—and are *material* (*z*); and if you have given your opinion in favour of the assured, and afterwards (and before the assurance is effected) you find that you were wrong in your opinion, you must (*semble*) say so (*a*).

Inadequacy of consideration, —when it will, and when it will not, avoid a contract.

Upon a sale of real estate, any mere inadequacy in the price or consideration is not *per se* a fraud in equity,—*Scil.*, because every one is entitled to dispose of his property at whatever price (and upon whatever terms) he chooses (*b*),—and the value of a thing is what it will produce, and one man may sell for less and another for more, and the sole inducement to the purchaser may have been the lowness of the price (*c*); and even when the sale is by the tenant for life under the Settled Land Act, 1882, and the sale is at an under-value, the purchaser will (in the general case) be protected (*d*).

There may, however, be such inadequacy in the price, as to demonstrate *per se* some gross imposition: And even where the inadequacy is not of that shocking character, if there are other circumstances of a suspicious nature, the inadequacy is a strong element (and evidence) of fraud (*e*),—unless and until the circumstances are explained away, consistently with honesty and fairness: But an apparent gross inadequacy may not be a real inadequacy, when everything is known (*f*),—as where (*e.g.*) the apparent inadequacy has resulted from a sudden increase of value in the land arising from adventitious circumstances (*g*).

Fraudulent contracts,—where rescission impossible, effect.

A fraudulent contract being, in general, valid until repudiated, the repudiation may become impossible,—as

(*y*) *Thomson* v. *Weems*, 9 App. Ca. 671.
(*z*) *Joel's case*, 1908, 2 K. B. 863.
(*a*) *Davies* v. *London Insurance*, 8 Ch. D. 469.
(*b*) *In re Wragg*, 1897, 1 Ch. 796.
(*c*) *Griffith* v. *Spratley*, 1 Cox, 383.
(*d*) *Hurrell* v. *Littlejohn*, 1904, 1 Ch. 689.
(*e*) *Rees* v. *De Bernardy*, 1896, 2 Ch. 437.
(*f*) *Harrison* v. *Guest*, 6 De G. M. & G. 424.
(*g*) *Edwards* v. *Meyrick*, 2 Ha. 60.

where (*e.g.*) the parties cannot be restored to their original *status quo* (*h*),—or where the rights of third parties have intervened: And, for example, a fraudulent contract to take shares in a company cannot (as against the creditors of the company) be rescinded, after the commencement of the winding up (*i*),—*Scil.*, after the presentation of the petition on which the winding up order is made (*k*): But a *de facto* removal of the shareholder's name from the register, or even the commencement of an action for its removal,—if only it be in time,—is a sufficient repudiation of the contract; and any mere delay in asserting the right to relief, if it is excusable and excused,—or if it has done no harm in the meantime,—will not be considered an abandonment of the right of the shareholder to have his name removed.

Circumstances under which rescission impossible.

No rescission against innocent third parties.

Contracts for shares, although fraudulent, may not be voidable even: For example, if A. (by fraud) induces B. to buy A.'s shares, *and the company is not implicated in A.'s fraud,* the contract will hold good as between B. and the company,—B.'s remedy (in such a case) being against A. only, for a re-transfer of the shares and for an indemnity: But if the company is at all implicated (directly or indirectly) in the fraud of A., the contract will be voidable even as against the company (*l*). Also, the contract, even after it has been completely executed, may be rescinded, but only on the ground of fraud (*m*),—the fraud being (in this case) *personal* fraud (*n*).

Fraudulent contract,—usually valid, until avoided.

When it is said that a contract voidable for fraud is "*valid until repudiated*," that is a very different thing from saying that the contract is "*void until confirmed*" (*o*),—which is why some proceeding is necessary (before the winding-up) to avoid the contract for

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(*h*) *Lagunas Nitrate* v. *Lagunas Syndicate*, 1899, 2 Ch. 392.
(*i*) *Spackman* v. *Evans*, L. R. 3 H. L. 171.
(*k*) *Whiteley's case*, 1899, 1 Ch. 770.
(*l*) *Lynde's case*, 1896, 1 Ch. 178.
(*m*) *May* v. *Platt*, 1900, 1 Ch. 616.
(*n*) *Seddon* v. *Salt Co.*, 1905, 1 Ch. 326.
(*o*) *Oakes* v. *Turquand*, L. R. 2 H. L. 325.

shares (*p*),—and, in the meantime (and before the winding-up), you may (on account of the fraud) defend an action for calls on the shares (*q*),—which if you do, you have done enough by way of repudiation:

Frauds which are so by force of statute; (1) Fraudulent preference.

There are certain frauds in relation to companies which, whether they are frauds in themselves or not, are specific frauds by statute: And, Firstly, under s. 210 of the Companies Act, 1908,—formerly s. 164 of the Companies Act, 1862, any conveyance, mortgage, &c., which (in the case of an individual trader) would be a fraudulent preference on his bankruptcy, is a fraudulent preference on the winding up of the company,—and may be set aside accordingly (*r*). Secondly, under the 38th section of the Companies Act, 1867, the non-disclosure of contracts between the promoters of a projected company and the persons contracting with them, if the contracts were of a kind to influence (*s*) (and did in fact influence (*t*)) the prospective shareholders, rendered the prospectus fraudulent (*u*); as did also any purported disclosure of such contracts, which was a mere mockery and insufficient (*v*). Moreover, a prospectus which was otherwise fraudulent was not good, merely because it disclosed all such contracts (*x*): And a waiver clause in the prospectus was not, of necessity, binding (*y*), although it might have been so; but under the Companies Act, 1900 (*z*), by s. 10, sub-s. 5, such a waiver clause was rendered absolutely void in all cases. And now, under the Companies Act, 1908, by s. 81, sub-s. 4, as regards prospectuses and the contents thereof, —and by s. 85, sub-s. 5, as regards the allotment of shares and the conditions preliminary thereto,—any waiver clause is simply void; and by s. 81, all material contracts are to be specified in the prospectus,—excepting contracts

(2) Non-disclosure of contracts

(3) Waiver clauses.

(*p*) *Reese River* v. *Smith*, L. R. 4 H. L. 64.
(*q*) *Venezuela R. C.* v. *Kisch*, L. R. 2 H. L. 99.
(*r*) *Willmott* v. *London Celluloid Co.*, 34 Ch. Div. 147.
(*s*) *Broome* v. *Speak*, 1904, A. C. 342.
(*t*) *Nash* v. *Calthorpe*, 1905, 2 Ch. 237.
(*u*) *Andrews* v. *Mockford*, 1896, 1 Q. B. 372.
(*v*) *Gluckstein* v. *Barnes*, 1900, A. C. 240.
(*x*) *Aaron's Reefs* v. *Twiss*, 1896, A. C. 273.
(*y*) *Cackett* v. *Keswick*, 1902, 2 Ch. 456.
(*z*) 63 & 64 Vict. c. 48.

entered into more than two years before, or entered into in the ordinary conduct of the business of the company; and by s. 88, where any shares are allotted as fully or partly paid up, and the consideration is not cash (pure and simple), the contract (or some memorandum of it) is to be filed with the Registrar of Companies,—under a penalty of (not exceeding) £50 a day for every day the filing is not made.

(4) Capital, misapplication of.

Thirdly, making payments out of capital, which ought to be paid (if paid at all) out of profits only, is a fraud in the nature of a misfeasance by the directors and other officials of the company, for which they are answerable to the shareholders (*a*)—unless the payment is justified under s. 91 of the Act of 1908 (or formerly, under s. 9 of the Act of 1907): Also, although you may lawfully apply a portion of the capital in the payment of interest on pre-paid shares (*b*), yet you cannot (in the case of companies registered under the Companies Acts) issue shares at a discount (even as between the shareholders themselves (*c*)), —and you cannot, in fact, either *decrease* or *increase* the liability on the shares (*d*): But you may issue the shares at a premium,—and you may issue bonds or debentures either at a discount or at par or at a premium,—provided, of course, you are doing so *bonâ fide* (*e*). And a company may not buy its own shares (*f*),—although it may now re-issue its redeemed debenture stock (*g*). And, *nota bene*, a company, which was otherwise duly constituted under the Companies Acts, was not a fraudulent company merely because it was (in effect) a one-man company (*h*): but, in such a case, the assignment to the company might occasionally have been set aside as a fraud on the creditors of the man who created the company (*i*); and the Court

(5) One-man company frauds.

(*a*) *Barrow Hematite case*, 1902, 1 Ch. 353.
(*b*) *Lock* v. *Queensland Investment Co.*, 1896, A. C. 461.
(*c*) *Welton* v. *Saffery*, 1897, A. C. 299.
(*d*) *Bisgood* v. *Henderson's Transvaal*, 1908, 1 Ch. 743.
(*e*) *Moseley* v. *Koffyfontein Mines*, 1904, 2 Ch. 108.
(*f*) *Trevor* v. *Whitworth*, 12 App. Ca. 409.
(*g*) Companies Act, 1908, s. 104 (formerly Act, 1907, s. 25).
(*h*) *Salomon* v. *Salomon & Co.*, 1897, A. C. 22.
(*i*) *In re Hirth*, 1899, 1 Q. B. 612.

was latterly greatly disposed to find some way of invalidating certain debenture issues, which operated to the grave prejudice of the unsecured creditors (*k*).

(6) Minority overborne by majority of shareholders, —for the unfair advantage of the majority.

As regards frauds upon the shareholders of a company generally,—The rule is, that the *internal* management (or mismanagement) of the company must, as a general rule, be left to the directors,—and the Court is not in the habit of interfering with that (*l*),—*Scil.*, because the company itself (that is to say, the shareholders) may always, in general meeting, control the management (or correct the mismanagement) of the directors: But still, if a majority of the shareholders are in league with the directors, and are *unfairly overruling the minority*,—and especially if the majority are (in effect) pocketing all the divisible profits *in exclusion of the minority*, or are otherwise denying to the minority the exercise of their just rights,—the Court will interfere at the suit of the minority (*m*).

(C) *Frauds on Imbeciles, &c.*

Besides the frauds hitherto considered, there are certain frauds (so-called) which are only frauds by reference to the incapacity or imbecility of the defrauded party: Thus,—

(1) Lunacy.

Firstly, The contract of a person *non compos mentis* will, usually, be set aside in a Court of Equity,—although, where it is for the benefit of the *non compos* (or is for necessaries supplied to him (*n*), or is an ordinary trade contract (*o*)), it will be good enough,—Because, generally, if a purchase is made in good faith, without any knowledge of the incapacity (and no advantage has been taken of the *non compos* (*p*)), the Court will (wherever it can) uphold the transaction,—to the extent, at all events, of the benefit accrued to the lunatic (*q*).

(2) Drunkenness.

Secondly, as regards the contracts of a *drunkard*,—To set aside his contract, it is not sufficient, that the

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(*k*) *In re Jackson and Bassford*, 1906, 2 Ch. 467.
(*l*) *Foss* v. *Harbottle*, 2 Ha. 461.
(*m*) *Menier's case*, L. R. 9 Ch. App. 350.
(*n*) *Molton* v. *Camroux*, 4 Exch. 17.
(*o*) *Niell* v. *Morley*, 9 Ves. 478.
(*p*) *Imperial Loan Co.* v. *Stone*, 1892, 1 Q. B. 599.
(*q*) *Molyneux's case*, 1905, A. C. 555.

party was under excitement or lethargy from liquor (*r*); but if there was any contrivance to draw him into drink, —and so take advantage of him, the Court would relieve, —That is to say, equity will not, in general, lend its assistance to the purchaser,—nor yet assist the drunken man,—but will leave each to his ordinary *legal* remedy, —excepting always where *some imposition has been practised*.

(3) General imbecility.

Thirdly, as regards a person, who (without being *non compos*) is of such weakness of mind as to be unable to guard himself against imposition,—If the circumstances justify the conclusion, that the party has been imposed on, the transaction will be avoided in equity,—the burden of proof being on the other party to show, that no unfair advantage was taken of the weakness (*s*): And the like rules are applicable as regards wills obtained by the exercise of undue influence upon testators; but it must (in such cases) be shown, that the volition of the testator was repressed,—So as that what he did, he did not desire to do; and the mere fact, that (in making his will) he was influenced by (*e.g.*) immoral (*t*) or irreligious (*u*) considerations, does not, of itself, amount to undue influence.

(4) Undue influence (on testators).

(5) Duress, and extreme necessity.

Fourthly, where a person of competent understanding is under duress when he makes the contract,—or is in extreme terror (*x*) or mental anguish (*y*) at the time,—equity will protect him.

(6) Infancy.

As regards the Contracts of Infants,—These demand a more particular treatment; And, firstly, infants are permitted by the law to bind themselves by their contracts for *necessaries* (*z*),—and by their contracts of hiring and service, and generally by acts which the law requires them to do,—excepting that they are not bound by any contracts which are manifestly to their disadvantage. There used also, formerly, to be this great distinction between the contracts of infants and the contracts of lunatics, namely,—The contract of a lunatic was (and

(a) Contracts for necessaries.

(b) Other personal contracts.

(aa) Old law;

(*r*) *Villers* v. *Beaumont*, 1 Vern. 100.
(*s*) *Longmate* v. *Ledger*, 2 Giff. 164.
(*t*) *Wingrove* v. *Wingrove*, 11 Pro. Div. 81.
(*u*) *Morley* v. *Loughnan*, 1893, 1 Ch. 736.
(*x*) *Hawes* v. *Wyatt*, 3 Bro. C. C. 158.
(*y*) *Williams* v. *Bayley*, L. R. 10 H. L. 200.
(*z*) *Barnes* v. *Toye*, 13 Q. B. D. 410.

is) *ab initio* void, and can never be validated in any mode, —*Scil.*, if the other contracting party has known of the lunacy at the date of making the contract; but the contracts of an infant, unless where they were manifestly to his disadvantage, were merely voidable,—So that it used to be in the power of the infant to confirm them, when he arrived at full age, and within a reasonable time thereafter (*a*). But, *now*, under the Infants' Relief Act, 1874 (*b*), all the *personal* contracts (and not merely the money-lending and money-raising contracts) of the infant are made utterly void (*c*),—and are therefore no longer confirmable; and the infant cannot be made a judgment debtor in respect thereof (*d*). But, of course, an infant's contract for necessaries remains binding on him; and his marriage articles are (for this purpose) a contract for necessaries (*e*),—or, at all events, such a contract is only voidable, and may be confirmed by the infant on (and within a reasonable time after) attaining his age of twenty-one years (*f*),—assuming always, that (after attaining twenty-one) the infant has the legal capacity to affirm, and not otherwise (*g*).

(bb) New law.

(c) Marriage articles.

Money actually paid by an infant, under (*e.g.*) an agreement for renting a tenement and for the purchase of the furniture therein, cannot be recovered back, *where there has been part enjoyment by the infant* (*h*),—Because it would be a fraud in him to seek to recover back the money, and because the protection which the law gives to an infant, is limited to his protection,—and does not justify him in the perpetration of a fraud upon others: Therefore, also, his voluntary gift even (being otherwise good) will hold good against him (*i*): Also, an infant will be bound by the condition annexed to a *devise* to him, where he accepts the devise; and the law is the same as regards a *bequest* to him, which is saddled with a condi-

(d) Money paid.

(e) Conditions or incidents annexed to devises, bequests, and other gifts.

(*a*) *Partridge* v. *Partridge*, 1894, 1 Ch. 351.
(*b*) 37 & 38 Vict. c. 62.
(*c*) *Smith* v. *King*, 1892, 2 Q. B. 543.
(*d*) *Ex parte Beauchamp*, 1894, 1 Q. B. 1.
(*e*) *Duncan* v. *Dixon*, 44 Ch. Div. 211.
(*f*) *Edwards* v. *Carter*, 1893, A. C. 360.
(*g*) *Viditz* v. *O'Hagan*, 1900, 2 Ch. 87.
(*h*) *Lempriere* v. *Lange*, 12 Ch. D. 675.
(*i*) *Taylor* v. *Johnstone*, 19 Ch. D. 603.

tion, or with any intrinsic liability (*k*): Also, an infant might have subscribed for shares in a limited company (*l*), —and might have accepted a transfer of such shares (*m*),— subject always to his right to repudiate the shares within a reasonable time after his attaining age: But, since the Infants Relief Act, 1874, that cannot now be; and, even under the old law, the transfer to an infant did not relieve the transferor from the liability (if any) which remained on the shares (*n*).

(7) Coverture. (7) As regards Married Women,—Generally speaking, a married woman had no capacity (either at law or in equity) to enter into any contracts (*o*),—*Scil.*, on her own account as a principal,—for her contracts, even when for necessaries, bound not herself (but her husband (*p*)). But, as regards her separate property (not being, at the time of the contract, subject to the restraint on anticipation), a married woman was (and is) capable (in equity) of entering into contracts; and under the Married Women's Property Acts, 1882 and 1893, she is made fully capable of entering into contracts of every kind,—equally as a man may do, and with (in effect) the same consequences,— Saving and excepting always as regards her separate estate which is restrained from anticipation (*q*).

(*k*) *Scott* v. *Hengler*, 2 Vern. 560.
(*l*) *Re Laxon & Co.*, 1892, 3 Ch. 555.
(*m*) *Capper's case*, L. R. 3 Ch. App. 458.
(*n*) *Nickalls* v. *Merry*, L. R. 7 H. L. 530.
(*o*) *Emery* v. *Wase*, 8 Ves. 505.
(*p*) *Jenner* v. *Morris*, 3 De G. F. & J. 45.
(*q*) *Brown* v. *Dimbleby*, 1904, 1 K. B. 28.

CHAPTER IV.

CONSTRUCTIVE FRAUD.

Constructive frauds,—varieties of.

CONSTRUCTIVE Fraud is (or arises) where, although there may be no fraud in fact, yet the transaction is *deemed* fraudulent,—Either

(1) Because it is contrary to the Policy of the Law; or
(2) Because it is an Abuse of some Fiduciary Relation; or
(3) Because it operates as a Fraud upon the Private Rights and Interests of Third Persons.

I. Constructive frauds, as contrary to policy of the law.

(1) Marriage-brokage contracts, &c.

I. *Constructive Frauds, Because Contrary to the Policy of the Law.*—Marriage-Brokage Contracts (*a*),—also Place-Brokage Contracts (*b*),—are examples of these; and all such contracts are utterly void and incapable of confirmation; and a marriage-by-advertisement-contract is in the same category as a marriage-brokage contract (*c*); and the money paid pursuant to any of these contracts may be recovered back (*d*).

(2) Reward to parent or guardian to consent to marriage of child.

(3) Secret agreements in fraud of marriage.

Also, any contract by which a parent or guardian obtains any remuneration,—for promoting or consenting to the marriage of his child or ward,—is void (*e*): And where A., on the marriage of his sister, let her have money privately (in order that her portion might appear as large as was insisted on by the intended husband), and she gave a bond to her brother for the repayment of the money,—The bond was decreed to be delivered up (*f*).

(*a*) *Hall* v. *Potter*, Show. P. C. 76.
(*b*) *Law* v. *Law*, 3 P. Wms. 391.
(*c*) *Hermann* v. *Charlesworth*, 1905, 2 K. B. 123.
(*d*) *Smith* v. *Brunning*, 2 Vern. 392.
(*e*) *Clarke* v. *Parker*, 19 Ves. 1.
(*f*) *Gale* v. *Lindo*, 1 Vern. 475.

(4) Rewards given for influencing another person in making a will.

And, generally, wherever a bond is given to induce another person to do any act in favour of the obligor, the bond is void,—as *tending* to fetter the exercise of free judgment (*g*).

(5) Contracts in general restraint of marriage,—void.

Contracts and conditions in general restraint of *marriage* are void; and if the contract or condition, although not in restraint of marriage generally, is still of so rigid a nature, that the party upon whom it is to operate is unreasonably restrained by it, it will fall under the like consideration (*h*). Also, contracts in general restraint of *trade* are void,—as tending to discourage industry and just competition; but if the restraint be limited, as regards *place* or as regards *time*, it will be good; and a person may lawfully sell a secret in his trade or business, and restrain himself *absolutely* from using the secret (*i*). The Court will also, where it can, sever what is reasonable from what is unreasonable in the restraint (*k*),—especially where the restraint occurs in a contract of service (*l*): And, apparently, a contract in restraint of trade may be valid, although it should be unlimited, either in point of *space* (*m*) or of *time* (*n*),—assuming always, that (under all the circumstances, and having regard in particular to the contract itself) the restraint is (in the opinion of the judge (*o*)) a reasonable one.

(6) Contracts in general restraint of trade,—void; but not special restraints.

(7) Agreements founded on violation of public confidence.

Agreements in violation of the rules which are in furtherance of the administration of justice,—contracts (*e.g.*) for the buying and selling (or procuring) judicial offices (*p*), or for the suppression of criminal prosecutions (*q*),—are void; as are also contracts which encourage champerty, or which are founded upon corrupt and illegal considerations generally (*r*).

(*g*) *Debenham* v. *Ox*, 1 Ves. 276.
(*h*) *Keily* v. *Monck*, 3 Ridg. P. C. 205.
(*i*) *Harms* v. *Parson*, 32 Beav. 328.
(*k*) *Baker* v. *Hedgecock*, 39 Ch. Div. 520.
(*l*) *Underwood* v. *Barker*, 1899, 1 Ch. 300.
(*m*) *Nordenfelt* v. *Maxim Co., Limited*, 1894, A. C. 535.
(*n*) *Haynes* v. *Doman*, 1899, 2 Ch. 13.
(*o*) *Dowden-Pook* v. *Pook*, 1904, 1 K. B. 45.
(*p*) *Chesterfield* v. *Janssen*, 1 Atk. 352.
(*q*) *Johnson* v. *Ogilby*, 3 P. Wms. 277.
(*r*) *Lound* v. *Grimwade*, 39 Ch. Div. 605.

(8) Frauds in relation to the transfer of shares in joint-stock companies.

By the Companies Acts, shares in joint-stock companies have always been freely transferable (the mode of transfer being that prescribed by the regulations of the company); but a transfer which is subject to a reservation in favour of the transferor,—and made with the object merely of getting rid of the liability for calls,—is fraudulent and void (*s*): *Secus*, if the transfer is absolute (*t*). Also, when the directors have the right of rejecting transferees, any concealment or misrepresentation (materially affecting the worth of the transferee) would render the transfer invalid,—even although accepted (*u*): *Secus*, if the directors have no power of rejection. In general, also, as between trustees and *cestuis que trustent*, the trustee whose name is on the register is liable (and not the *cestui que trust*),—the trustee (*where the investment is proper*) having, in such a case, a right of indemnity (*x*); but if the shares are placed in the name of the trustee *only colourably and for the purpose of evading the legal liability*, the *cestui que trust* will be liable (*y*).

Neither party to an illegal agreement is aided, as a general rule,—except where agreement is contrary to public policy.

Where both parties are involved in,—and are "*alike*" involved in,—an illegal agreement, equity will not (as a rule) grant any relief to either of them,—Because *In pari delicto, potior est conditio possidentis;* but, where the agreement is challenged *as being against public policy*, the circumstance that the relief is asked by one who is *particeps fraudis*, is not (in equity) material,—the relief being given to the public through the party (*z*), and not to the party: Also, if one of the parties is *more in fault* than the other, relief will be given (*a*).

II. Constructive frauds, arising from the fiduciary relation.

II. *Constructive Frauds, Because an Abuse of some Fiduciary Relation.*—Frauds on the relation of parent and child are an example of these,—all contracts and conveyances whereby benefits are secured by children to their parents being the objects of the Court's jealousy,—So

(*s*) *De Pass's case*, 4 De G. & J. 544.
(*t*) *Lindlar's case*, 1910, 1 Ch. 207, 312.
(*u*) *Ex parte Kintrea*, L. R. 5 Ch. App. 95.
(*x*) *Castellan* v. *Hobson*, L. R. 10 Eq. 47.
(*y*) *Hardoon* v. *Belilios*, 1901, A. C. 118.
(*z*) *Roberts* v. *Roberts*, 3 P. Wms. 66.
(*a*) *Osborne* v. *Williams*, 18 Ves. 379.

(1) Gifts from child to parent,—void, if not in perfect good faith.

that, if these contracts are not entered into with scrupulous good faith, they will be set aside; and, for example, where a female child, shortly after attaining her majority, made over property to her father without consideration, the father was required to show, that the child (in the matter of the gift or conveyance) was a free agent and had independent advice (*b*): And the like rule was supposed to be applicable also to gifts made by a wife under the pressure of her husband (*c*); but it is now doubtful, if that is so (*d*): And in all this class of cases, the relief asked for must be asked for within a reasonable time, any delay being (usually) fatal (*e*). And although the rule is, in general, inapplicable to the re-settlements which, on the eldest son's attaining his age of twenty-one years, are made of the family estates (*f*),—yet, even in the case of these re-settlements, it is a fraud, if the father gets a disproportionate advantage by them (*g*). And as regards a husband who (in effect) deprives his wife of all her property,—by getting it charged with moneys advanced to a rotten business in which he is interested,—there is no doubt, that the charge is void by reason of the undue influence of the husband on the wife (*h*).

(2) Guardian and ward,—gift by ward soon after the termination of guardianship, viewed with suspicion; Gift upheld, when influence and legal authority have ceased.

(3) *Quasi* guardians.

Equity will not uphold transactions between guardians and wards, *even when entered into after the wardship has ceased,* if the intermediate period has been short (*i*),—*Scil.*, unless the circumstances demonstrate the most abundant good faith on the part of the guardian (*k*); but where the influence of the guardian has ceased, and there has been a settlement of the accounts, equity will not set aside a reasonable gift made by the *ward* to his or her *guardian* (*l*): And the like principles apply also,—usually, but not invariably,—to persons standing in the situation of *quasi*

(*b*) *Bainbrigge* v. *Browne*, 18 Ch. Div. 188.
(*c*) *Turnbull* v. *Duval*, 1902, A. C. 429.
(*d*) *Howes* v. *Bishop*, 1909, 2 K. B. 390.
(*e*) *Turner* v. *Collins*, L. R. 7 Ch. App. 329.
(*f*) *Hoblyn* v. *Hoblyn*, 41 Ch. D. 200.
(*g*) *Hoghton* v. *Hoghton*, 15 Beav. 278.
(*h*) *Bank of Montreal* v. *Stuart*, 1911, A. C. 120, citing *Nedby* v. *Nedby*, 5 De G. & S. 377.
(*i*) *Pierse* v. *Waring*, 1 P. Wms. 121.
(*k*) *Wright* v. *Vanderplank*, 2 K. & J. 1.
(*l*) *Hatch* v. *Hatch*, 9 Ves. 297.

guardians,—as medical advisers (*m*), "spooks" (*n*), ministers of religion (whether priests (*o*) or preachers (*p*)), managers (*q*), and the like. But, if the donor (after the confidential relation has ceased) elects to "*abide by the gift*," that would be a confirmation of the gift,—So that the legal personal representatives of the donor could not thereafter set aside the gift (*r*): Nor could any beneficiary do so, who claimed through or under the donor (*s*): But it would be otherwise, if the donor (in his lifetime) had commenced proceedings for the purpose (*t*).

(4) Solicitor and client. *Gift* from client to solicitor, pending that relation, cannot stand.

And, as regards (in particular) the relation of Solicitor and Client,—It appears, that *a solicitor cannot sustain a* GIFT *from his client*,—for, although a solicitor may PURCHASE from his client (subject always to satisfying the Court of the propriety of the purchase), a far stricter law is applicable to *Gifts* (*u*),—such a gift being simply void; and it is not confirmable, nor made good by any lapse of time (*x*): However, a gift can validly enough be made by the client to his solicitor by will; and a gift made *inter vivos* may be confirmed by the will (*y*). And the distinction aforesaid between a gift by *deed* and a gift by *will* rests upon the circumstance, that the influence of the solicitor is supposed to be continuing where the gift is *inter vivos*, but not where the gift is on death (*z*). Also, generally, a solicitor shall not in any way whatever,—either personally or through his wife (*a*) or through his son (*b*),—make any gain to himself at the expense of his client (*c*),—beyond, of course, the just and fair remuneration for his services:

(*m*) *Dent* v. *Bennett*, 4 My. & Cr. 269.
(*n*) *Lyon* v. *Home*, L. R. 6 Eq. 655.
(*o*) *Huguenin* v. *Baseley*, 14 Ves. 273.
(*p*) *Norton* v. *Bell*, 2 Eden. 286.
(*q*) *Coomber* v. *Coomber*, 1911, 1 Ch. 174, 322.
(*r*) *Mitchell* v. *Homfray*, 8 Q. B. D. 537.
(*s*) *Skottowe* v. *Williams*, 3 De G. F. & J. 535; and *Coomber* v. *Coomber*, *supra*.
(*t*) *Phillipson* v. *Kerry*, 32 Beav. 628.
(*u*) *Tomson* v. *Judge*, 3 Drew. 306.
(*x*) *Nutt* v. *Easton*, 1899, 1 Ch. 873.
(*y*) *Hindson* v. *Weatherill*, 5 De G. M. & G. 301.
(*z*) *Rhodes* v. *Bate*, L. R. 1 Ch. App. 252.
(*a*) *Liles* v. *Terry*, 1895, 2 Q. B. 679.
(*b*) *Barron* v. *Willis*, 1902, A. C. 271.
(*c*) *Tyrrell* v. *Bank of London*, 10 H. L. Cas. 26.

Solicitor, his professional remuneration.

And as regards what shall be the just and fair remuneration of a solicitor,—

Firstly, if the solicitor is also a trustee, and the business has been transacted in connection with the trust estate, it has been shown (on pp. 107 and 108, *supra*), that he is not entitled to charge in respect of that,—although, if he is a mortgagee, he may now (by express statutory provision) make all the usual charges of a mortgagee. But

Secondly, if he is merely a solicitor (and neither a trustee nor a mortgagee), the rules applicable to his remuneration (for professional services) may be stated as follows:—

(1) An agreement between a solicitor and his client, that a gross sum shall be paid for *past* costs, is valid, provided the agreement be in writing (*d*); but it behoves the solicitor to use great caution, and to preserve sufficient evidence that the transaction was a fair one, and that the client was not under the influence of the solicitor (*e*): And

(2) An agreement by a solicitor, to receive a fixed sum by way of costs for *future* business,—although it was formerly invalid and would have been set aside even after payment (*f*),—will now, under the 33 & 34 Vict. c. 28, s. 4 (as regards contentious business), and under the 44 & 45 Vict. c. 44, s. 8 (as regards non-contentious business), be good and valid, provided again it be in writing (*g*). But

(3) Every such contract is subject to taxation as a bill of costs,—and may (if improper) be set aside (*h*): Also, in every case, the amount payable under the agreement must have regard to the work done (*i*); and the solicitor must not (by the agreement) place himself in any position in which his duty and his interest conflict (*k*).

And here note, that (excepting by agreement) a solicitor must see a matter through, before asking for his

(*d*) *In re Russell*, 30 Ch. Div. 114.
(*e*) *Morgan* v. *Higgins*, 1 Giff. 277.
(*f*) *In re Newman*, 30 Beav. 196.
(*g*) *Bake* v. *French* (No. 2), 1907, 2 Ch. 215.
(*h*) *In re Frape*, 1893, 2 Ch. 284.
(*i*) *Ex parte Cathcart*, 1893, 2 Q. B. 201.
(*k*) *In re Haslam and Hier-Evans*, 1902, 1 Ch. 765.

remuneration (*l*),—but the exceptional circumstances of the case might make a difference in that,—especially in long-protracted Chancery proceedings.

(5) Trustee and *cestui que trust.*

As regards the relation of trustee and *cestui que trust*, —A trustee is bound not to do anything which places him in a position inconsistent with the interests of the trust, or which has a tendency to interfere with his own duty in discharging the trust: Therefore a "*purchase*" by the trustee from his *cestui que trust* (although at an adequate price) may be set aside at the option of the *cestui que trust*,—For, as observed by Lord Eldon (*m*), —and also by Lord Cottenham (*n*),—though you may see in a particular case that the trustee has not taken any advantage, it is utterly impossible (in ninety-nine cases out of a hundred) to see whether he has done so or not,— So that even when the *cestui que trust* demonstrably intended the trustee to purchase, the purchase is regarded "with infinite jealousy" (*o*). Also, a trustee is never permitted to accept of a GIFT from his *cestui que trust*, except under circumstances which would make the *gift* valid in a case of guardianship: That is to say, the relation must have ceased (and the influence arising from that relation must also have ceased), in order to the validity of the gift.

(6) Principal and agent.

And all the same (or the like) principles are applicable to the relation of principal and agent,—So that, agents may not become either the secret vendors or the secret purchasers of the property which they are entrusted with on behalf of their principals (*p*); nor can they, in fact, deal at all with their principals, *without a full disclosure* (*q*): If, therefore, an agent, employed to purchase, purchase for himself, he will be held a trustee for his principal (*r*),—and will not be permitted to make a profit out of the transaction (*s*),—not even, *semble*, when

(*l*) *Whitehead* v. *Lord*, 7 Exch. 691.
(*m*) *Ex parte James*, 8 Ves. 337.
(*n*) *In re Bloye's Trust*, 1 Mac. & G. 481.
(*o*) *Coles* v. *Trecothick*, 9 Ves. 234.
(*p*) *Charter* v. *Trevelyan*, 11 C. & F. 714.
(*q*) *De Bussche* v. *Alt*, 8 Ch. Div. 286.
(*r*) *Lees* v. *Nuttall*, 1 Russ. & My. 53.
(*s*) *Grant* v. *Gold Exploration*, 1900, 1 Q. B. 233.

(7) Counsel, auctioneers, &c., and their clients.

he is a broker (*t*): Similarly, counsel (*u*), assignees of bankrupts' estates (*x*), auctioneers (*y*), and the like. But a broker is not, *semble*, within these rules (*z*).

III. Constructive frauds, as being injurious to the rights of third parties.

III. *Constructive Frauds, Because Prejudicial generally to the Private Rights and Interests of Third Persons.*—The improvident contracts of common sailors are an example of these; and relief will, generally, be given, whenever any inequality appears in the bargain, or any undue advantage appears to have been taken (*a*). Also, bargains with heirs, reversioners, legatees, and expectants, during the lives of their ancestors or testators (or while their enjoyment of the property is otherwise deferred), will be relieved against,—unless the purchaser can show that a fair price was paid (*b*); and from the mere inadequacy of the price, fraud will be presumed (*c*); and the onus, therefore, is on the purchaser to show, that the transaction is a reasonable one: But a "*fair*" price is not required to be a "*full*" price (*d*). And what is above stated regarding purchases, holds true also regarding loans (*e*). Moreover, the jurisdiction in equity was not affected by the 31 & 32 Vict. c. 4, which enacted, that no purchase made *bonâ fide* of a *reversionary* interest should be thereafter set aside merely *on the ground of undervalue* (*f*). Also, the fact that the father was aware of (or even took part in) the transaction, would not necessarily have made that valid which would otherwise have been void,—although that circumstance would have raised a slight presumption in favour of the lender; and where a father (being unable himself to supply his son's necessities) assisted him in raising the money,—and presumably advised him for the best,—the Court would perhaps infer (but would not readily infer) that the bargain was fair enough (*g*).

(1) Common sailors,—contracts by.

(2) Bargains with heirs and expectants.

(2a) Unconscionable loans,—generally.

(*t*) *Stubbs* v. *Slater*, 1910, 1 Ch. 195.
(*u*) *MacPherson* v. *Watt*, 3 App. Ca. 254.
(*x*) *Luddy's Trustee* v. *Peard*, 33 Ch. D. 500.
(*y*) *Crowther* v. *Elgood*, 34 Ch. Div. 698.
(*z*) *Robinson* v. *Mollett*, L. R. 7 H. L. 802.
(*a*) *Dow* v. *Wheldon*, 2 Ves. Sr. 516.
(*b*) *Perfect* v. *Lane*, 3 De G. F. & J. 369
(*c*) *Fry* v. *Lane*, 40 Ch. Div. 312.
(*d*) *Trye's ease*, 7 Cl. & F. 436.
(*e*) *Nevill* v. *Snelling*, 15 Ch. Div. 679.
(*f*) *Tyler* v. *Yates*, L. R. 6 Ch. App. 665.
(*g*) *King* v. *Savery*, 5 H. L. Cas. 267.

Money Lenders Act, 1900,—contracts within.

By the Money Lenders Act, 1900 (*h*),—for the protection of borrowers generally,—every money-lender (trading either exclusively or substantially as a money-lender, but not otherwise (*i*)), is required to be registered as such,—or else the loan is simply void (*k*): And where the loan is (for that reason) void, no repayment whatever need be made by the borrower (*l*),—unless, *semble*, where he is asking for *equitable* relief (as distinguished from *legal* relief (*m*)): The jurisdiction under the Act appears to be wider than the old jurisdiction in equity (*n*), —and the jurisdiction may, of course, be exercised in every Division of the High Court (*o*). Also, the loan must be negotiated and also completed (*p*),—excepting in any unessential part (*q*),—at the registered office of the money-lender; and otherwise it is void: And, *semble*, there cannot be two registered offices for the same money-lending business (*r*).

(3) *Post obits*

Post obit bonds are agreements by which borrowers agree to pay lump sums (exceeding the amounts advanced), on the deaths of the persons under whom they expect to become entitled to property,—and only in the event of their so becoming entitled, and not otherwise (*s*): For example, in *Chesterfield* v. *Janssen* (*t*), A., in 1738, gave B. a bond for £20,000, conditioned for the payment to B. on the death of C. of the sum of £10,000; and the amount lent to A. by B. was £5,000; and in 1744, C. died, and A. repaid £1,000 in 1745, and £1,000 in 1746, and then died; and A.'s executors claimed (on behalf of A.'s estate) to be relieved of the bond,—But the Court said, the further sum of £8,000 must be paid, A. having confirmed the transaction by his successive part-repay-

(*h*) 63 & 64 Vict. c. 51.
(*i*) *Litchfield* v. *Dreyfus*, 1906, 1 K. B. 584.
(*k*) *Dott's case*, 1906, 1 Ch. 740.
(*l*) *Chapman* v. *Michaelson*, 1909, 1 Ch. 238.
(*m*) *Lodge's case*, 1907, 1 Ch. 300.
(*n*) *Samuel* v. *Newbold*, 1906, A. C. 461.
(*o*) *Wilton* v. *Osborne*, 1901, 2 K. B. 110.
(*p*) *Gadd's case*, 1909, 2 K. B. 353.
(*q*) *Jackson's case*, 1910, 1 K. B. 143, following *Levine's case*, 1909, 25 T. L. R. 711.
(*r*) *Stirling* v. *Silburn*, 1910, 1 K. B. 67; *Sadler* v. *Cobb & Co.*, 1910, 1 K. B. 868; and *Whiteman* v. *Sadler*, 1910, A. C. 514.
(*s*) *Trye's case*, *supra*.
(*t*) 1 Atk. 352.

ments in 1745 and 1746,—Because, generally, *post obit* agreements (when not unconscionable) are good,—*Scil.*, for the sum (with interest thereon) to which *ex æquo et bono* the lender is entitled. Also, where tradesmen have sold goods (to expectants) at extravagant prices, equity only cuts down the claim to the reasonable and just amount (*u*); and where (after the pressure of the necessity has ceased) the party deliberately adopts the contract, it is binding (*v*).

(4) Tradesmen selling goods at extravagant prices.

(5) Knowingly producing a false impression to mislead a third party.

Where an estate is being offered for sale, and the true owner stands by and encourages the sale,—producing thereby the false impression that the purporting seller is the owner of the estate,—the true owner will be bound by the sale (*x*); and the same rule is applicable also to the sale of personal chattels (*y*). Also, where executors put it in the power of a broker to misapply securities to bearer, they will be estopped from disputing the broker's authority to deal with the securities (*z*): And where the directors of a company (the company having no power to accept bills) accept a bill, and purport to do so on behalf of the company, they are personally liable on the bill,—*Scil.*, because, by their acceptance, they represent, that the company has authority to do so (*a*): Also, the company itself will be estopped from saying, that any particular shares are not fully paid up, where it has issued certificates to the effect that the shares are fully paid up (*b*),—or has (by certification) formally certified to that effect (*c*); and the like estoppel will arise, as regards the bonds or debentures of the company (*d*). Also, companies may be estopped by mere negligence,—for example, by parting with the share certificates after certification (*e*), or by registering a transfer of the shares without production of the share certificate (*f*); but these

(*u*) *King* v. *Hamlet*, 3 Cl. & F. 218.
(*v*) *Jacques-Cartier* v. *Montreal City Bank*, 13 App. Ca. 111.
(*x*) *Price* v. *Neault*, 12 App. Ca. 110.
(*y*) *Pickard* v. *Sears*, 6 A. & E. 469.
(*z*) *Thompson* v. *Clydesdale Bank*, 1893, A. C. 282.
(*a*) *West London Commercial Bank* v. *Kitson*, 13 Q. B. D. 360.
(*b*) *In re Veuve Monnier*, 1896, 2 Ch. 525.
(*c*) *In re Concessions Trusts*, 1896, 2 Ch. 757.
(*d*) *Robinson* v. *Brewery Co.*, 1896, 2 Ch. 841.
(*e*) *Longman* v. *Bath Electric*, 1905, 1 Ch. 646.
(*f*) *Rainford's case*, 1905, 2 Ch. 147.

estoppels are not to be pressed too far against companies,—especially where there has been negligence also on the part of the complaining party (*g*), and where it is the company's secretary (rather than the company itself) that has been guilty of the negligence (*h*).

(6) Representations made in forgetfulness of one's own title, are also fraudulent.

Where a borrower represented that he was entitled to have a lease for ninety-nine years; and the lender required a written confirmation of that; and the lessor (*being told of the requisition and of its object*) gave the written confirmation; and the loan was made upon the faith of it,—And afterwards it appeared, that the lessor had already granted the lease, but had forgotten all about it, and that the lease had been already mortgaged by the borrower,—The lessor was held liable, *to the extent of the sum advanced* (with interest (*i*)). But the lessor might have declined to give the confirmation,—and might have declined to answer at all (*k*); and a man is not, *now*, considered liable as for negligence (*being forgetfulness*), —unless in cases where he is under a duty to the party (or places himself under such a duty (*l*)).

(7) Agreements at auctions not to bid against one another.

By the 30 & 31 Vict. c. 48, s. 6 (as regards lands), a vendor of real property may (in the particulars or conditions of sale) openly reserve the liberty to bid (in person or by one agent) at the sale; and by the 56 & 57 Vict. c. 71, s. 58 (as regards goods), the like right to bid may be reserved: And the necessity for these special provisions seems to show (and certainly suggests), that the employment of puffers at auctions (where the liberty to bid had not been so reserved) is a constructive fraud on purchasers, disentitling vendors to (*e.g.*) the remedy by specific performance (*m*),—and entitling purchasers to rescind, and to recover back their deposits (*n*): But the opinion is prevalent enough, that a "*knock-out*" sale is not illegal (*o*).

(*g*) *Sheffield Corporation* v. *Barclay*, 1905, A. C. 392.
(*h*) *Geo. Whitechurch* v. *Cavanagh*, 1902, A. C. 117.
(*i*) *Slim* v. *Croucher*, 1 De G. F. & J. 518.
(*k*) *Low* v. *Bouverie*, 1891, 3 Ch. 82.
(*l*) *Le Lievre* v. *Gould*, 1893, 1 Q. B. 491.
(*m*) *Mortimer* v. *Bell*, L. R. 1 Ch. App. 10.
(*n*) *Thornett* v. *Haines*, 15 Mee. & W. 367.
(*o*) Halsbury, Laws of England, vol. i. p. 512.

(8) Frauds upon creditors consenting to composition deeds.

As regards composition deeds,—If a creditor who is a party to the deed stipulates for some *clandestine* advantage (as a condition of his executing the deed), and his execution of the deed has induced other creditors to execute it, that is a fraud,—and the money paid may be recovered back (*p*); and (by the Scotch law) double that amount is (or used to be) recoverable (*q*). Also, any money paid by the outstanding creditor to the estate of the debtor, if the payment is part and parcel of the fraudulent agreement, is not recoverable back,—nor may such a creditor prove for it (*r*).

(9) A person obtaining a donation, must always be prepared to prove its *bona fides*.

As regards every transaction whereby one person obtains (by gift) a benefit from another, the donee ought to be able to show that the donor deliberately performed the act, knowing at the time its nature and effect; but a voluntary settlement (if it be otherwise proper) is not bad, merely because it contains no power of revocation (*s*),—nor is the donee under any duty to show that the settlement was intended to be without power of revocation (*t*), —Because, generally, where there has once been a gift, the onus is on the donor,—if he would take back the gift,—to show, that there has been some mistake on his part or else a *fraud* on him (*u*).

(10) A power must be exercised *bonâ fide* for the end designed.

The donee of a special power of appointment must exercise the power *bonâ fide* and for the end designed (*x*), and *not* for any purpose which is *foreign* to the power (*y*): For example, where a parent is the donee of a power of appointment among his children; and he appoints to one of the children, *upon a bargain for his (the parent's) own advantage*,—Equity will relieve against the appointment (*z*); and, in such a case, the appointment will be void altogether (*a*). Also, where there is a secret understand-

(*p*) *Higgins* v. *Pitt*, 4 Exch. 312.
(*q*) *Carter* v. *McLaren*, L. R. 2 H. L. Sc. 120.
(*r*) *In re Myers*, 1908, 1 K. B. 941.
(*s*) *Toker* v. *Toker*, 3 De G. J. & S. 487.
(*t*) *Hall* v. *Hall*, L. R. 8 Ch. App. 430.
(*u*) *Henry* v. *Armstrong*, 18 Ch. D. 668.
(*x*) *Aleyn* v. *Belchier*, 1 Eden, 132.
(*y*) *Brookes* v. *Cohen*, 1911, 1 Ch. 37.
(*z*) *Henty* v. *Wrey*, 21 Ch. D. 332.
(*a*) *Cloutte* v. *Storey*, 1911, 1 Ch. 18.

ing between the donee and the appointee, that the appointee shall (*e.g.*) assign back a part of the fund to the appointor (*b*),—or to the appointor's creditors,—that also is a fraud (*c*). But a power in A.B. to jointure his wife is an exception, apparently, to this rule (*d*). And where any one has a power to create portions for his children (and also to fix the time when they are to be raised); and he appoints to a child during the child's infancy, *and while the child is not in want of the portion*, and the death of the child is at the time of the appointment expected,—In such a case, the parent will not (as the personal representative of the child) be allowed, on the child's death under age, to derive any benefit from the appointment (*e*). But where the exercise of a special power of appointment is void in part only, *and the other part is severable*, the appointment will (as to the latter part) be valid (*f*); and if there have been successive appointments, and all of them are bad, save the last one, the original badness is sometimes said to be "*eliminated*,"—and the last one of the successive appointments becomes good (*g*).

But a release of the power, —although it may operate for the benefit of the donee of the power, —may be valid.

Where a father has a power to appoint among his children, and the children are entitled in default of appointment, the father may validly *release* the power,—even if he should himself thereby acquire some pecuniary advantage which he could not have obtained upon any actual exercise of the power (*h*): Therefore, where there was such a power of appointment in the father, and (in the events which had happened) the power had become a power to appoint exclusively in favour of a daughter or her issue, —and (in default of appointment) the daughter was absolutely entitled to the property,—and the father released the power; and thereafter he and his daughter mortgaged

(*b*) *Daubeny* v. *Cockburn*, 1 Mer. 626.
(*c*) *Carver* v. *Richards*, 1 De. G. F. & J. 548.
(*d*) *Saunders* v. *Shafto*, 1905, 1 Ch. 126.
(*e*) *Roach* v. *Trood*, 3 Ch. Div. 429.
(*f*) *Perkins* v. *Bagot*, 1893, 1 Ch. 283.
(*g*) *Carver* v. *Richards*, 1 De G. F. & J. 548.
(*h*) *Radcliffe* v. *Bewes*, 1892, 1 Ch. 227.

the property to secure a sum of £10,000 (paid to the father and applied by him for his own purposes),—The Court held, that the release was valid, and (with it) the mortgage (*i*). But, *nota bene*, a power which is "*coupled with a duty*" may not be released (*k*),—nor may the exercise of it be even fettered.

Covenant to exercise a power by will, —in one specified way,—

Where the power of appointment is a general power, it may (equally with a special power) be released,—*Scil.*, by deed: And where it is exerciseable by will only, the donee of the power may covenant either not to exercise it or (if she does exercise it) to exercise it only in favour of A., B., and C., and no others,—or only to a limited extent, and so as to "negatively tie his exercise" of the power (*l*):

Such a covenant is not enforced; but damages (for the breach of it) may be recoverable.

But such a covenant (even when it is for value) is not specifically enforceable by A., B., and C.,—Although, for breach of the covenant, damages would be recoverable (*m*): Also, a bond given to secure the exercise of the power in the way specified would be on the same footing as the covenant (*n*): Therefore, where the donee of a general power of appointment (exerciseable by will only) borrowed £*x* of A., and (by way of securing him) covenanted with A. to appoint in his favour,—*and so as to give him a first charge on the appointment property*,—and not to revoke that appointment; And he did, in fact, appoint in favour of A. accordingly,—A. was held to be entitled to rank only with the unsecured creditors of the appointor, —and to be paid *pari passu* with them (and without any priority over them) in respect of his purported first charge (*o*),—*Scil.*, because every appointment by will makes the property assets for the creditors generally, and the appointment by will to A. was a bequest by will to A.,—and not the less so, merely because of the prior agreement (by covenant or bond) to make the bequest. But if (in such a case) the appointor constitutes A. his executor, A. will, *semble*, obtain priority,—to the extent that

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(*i*) *Smith* v. *Somes*, 1896, 1 Ch. 250.
(*k*) *Chambers* v. *Smith*, 3 App. Ca. 795.
(*l*) *In re Evered*, *Molineux* v. *Evered*, 1910, 2 Ch. 147.
(*m*) *Hill* v. *Schwartz*, 1892, 3 Ch. 510.
(*n*) *Palmer* v. *Noake*, 15 Ch. D. 294.
(*o*) *Zaiser* v. *Lawley*, 1903, A. C. 411.

his right of RETAINER as executor shall extend to give him priority over the other creditors.

Where the donee of a power exercised the power, by appointing to one or more of the objects a merely nominal share of the property,—such an appointment (although valid at law) would have been set aside in equity as an "*illusory*" appointment (*p*),—Until, by the 1 Will. IV. c. 46, it was declared, that no appointment should be invalid, on the ground merely that an *illusory* share of the property had been appointed to any object of the power. And, as a consequence of that Act, the appointor might have cut off any appointee "with a shilling" (as the phrase went); and now, by the 37 & 38 Vict. c. 37, as regards any appointment made after the 30th May, 1874, the appointor may cut off any particular appointee even "without the shilling,"—*Scil.*, unless the power itself *expressly* directs, that *no object of the power is to receive less than some specified amount* (*q*).

Doctrine of illusory appointments.

Where a sub-lessor of building land represented to the plaintiff, that he (the sub-lessor) could not build so as to obstruct the sea-view from the houses which were going to be built by the plaintiff as sub-lessee,—saying, that (as the fact was) he (the sub-lessor) was by his own lease for 999 years (and which comprised certain intervening land) prevented from doing that,—And (upon the faith of that representation) the sub-lease was taken, and the houses were built,—And (*subsequently thereto*) the sub-lessor surrendered his 999 years' lease, and took (in lieu thereof) a new lease, *not containing any like restriction as to building*,—The Court restrained the sub-lessor, from building so as to obstruct the sea-view (*r*),—*Scil.*, Because, of course, the surrender of the old lease was subject to the plaintiff's then already acquired rights (*s*). Also, where there was a large building adapted for letting in residential flats, and the plaintiff and others (occupants

(11) A man representing a certain state of facts as an inducement to a contract, cannot derogate from it by his own act,—by, *e.g.*, obstructing a sea-view;

or otherwise destroying the peace and quiet of a building.

(*p*) *Wilson* v. *Piggott*, 2 Ves. 351.
(*q*) *In re Capon's Trusts*, 10 Ch. Div. 484.
(*r*) *Piggott* v. *Straton*, 1 De G. F. & J. 33.
(*s*) *Smalley* v. *Hardinge*, 7 Q. B. D. 524.

of the flats) held under tenancy agreements containing provisions for their occupation only as residential flats,—The landlord was restrained from converting the unoccupied portion of the building into a club (*t*),—*Scil.*, Because a man shall not be permitted to derogate from his own previous grant (whether express or implied (*u*)): But you must, of course, be able to show, that the thing you are complaining of is, in fact, a derogation from the previous grant (*x*).

(*t*) *Hudson* v. *Cripps*, 1896, 1 Ch. 265.
(*u*) *Martin* v. *Spicer*, 14 App. Ca. 12.
(*x*) *Rigby* v. *Bennett*, 21 Ch. D. 559.

CHAPTER V.

SURETYSHIP.

Suretyship,—when, and to what extent only, a contract *uberrimæ fidei?*

THE Contract of Insurance requires the utmost good faith between the parties to it,—and is *uberrimæ fidei;* but *suretyship* is not like insurance in that respect,—at least, in its inception (*a*), although in its incidents and consequences it may be so (*b*): That is to say,—The creditor is under no duty towards the surety, to inquire into the circumstances under which the surety becomes a surety,—unless where the circumstances are exceptional (*c*).

Under Statute of Frauds,—writing required for a "*guarantee*,"—*Seil.*, being a "*guarantee*" strictly so called.

The Statute of Frauds (29 Car. II. c. 3), by s. 4, requires, that the agreement to become and be a surety (or liable as a guarantee for the debt of another) shall be in writing,—and, of course, therefore, no one is bound as a surety without writing; but the case is different, if the so-called "*suretyship*" is, in fact, a substantive and independent (primary) liability,—sometimes called an "*indemnity*" (*d*).

Rights of creditor against surety,—regulated by the instrument of guarantee.

The rights of the creditor against the surety are wholly regulated by the written agreement; and where an obligation arises only by virtue of a written agreement, the extent of the obligation is to be measured by the words of the agreement (*e*),—So that (*e.g.*) where a surety is bound by a joint bond, the Court will treat the joint bond as a joint bond,—and will not make it a several bond (*f*). Also, whether the bond is joint or is joint

(*a*) *Seaton* v. *Burnand*, 1900, A. C. 135.
(*b*) *Pidcock* v. *Bishop*, 3 B. & C. 605.
(*c*) *Owen* v. *Homan*, 4 H. L. Ca. 997.
(*d*) *Guild & Co.* v. *Conrad*, 1894, 2 Q. B. 885.
(*e*) *Sumner* v. *Powell*, 2 Mer. 35, 36.
(*f*) *Rawstone* v. *Parr*, 3 Russ. 424, 539.

and several, if the obligors purport thereon to be liable to the obligee *direct*, you cannot (*as against the obligee*) show, that one or more of them were sureties only (*g*).

The question also of the duration of the suretyship,—and whether it is for goods supplied once only or for a continuing supply (*h*); and whether it is (as it usually will be (*i*)) determined by the death of the surety and by notice of the death, or continues after the death and after notice of the death (*k*),—and the question, whether the suretyship is for a *part* only (or for the *whole*) of the debt (*l*),—All these questions appear to be also merely questions of construction. But a suretyship, which is expressed to be a *continuing* one, will not be determined by the death of the surety, if the suretyship agreement contains a specific provision for its determination, and such provision is as applicable after the death as before the death (*m*): Also, the very nature of the liability insured against will, occasionally, itself show, that the obligation is to continue after the death and after notice of the death (*n*).

Surety,—when and when not discharged by the discharge of principal debtor.

If the written guarantee so express, the surety will be bound, even when the principal debtor is not bound,—a surety being often insisted upon, precisely because of the inability of the principal debtor to validly borrow (*o*). Moreover, the surety (being once bound) will continue bound, even after the principal debtor (being a company) has ceased to exist,—That is to say, if (by the agreement) the surety is to be liable for the interest, until the principal of the debt "*is paid*" (*p*),—although not, if the surety is to be liable for the interest, only while the principal of the debt "*remains due*" (*q*). But, where

(*g*) *Swire* v. *Redman*, 1 Q. B. D. 536.
(*h*) *Heffield* v. *Meadows*, L. R. 4 C. P. 595.
(*i*) *Harriss* v. *Fawcett*, L. R. 15 Eq. 311.
(*k*) *Lloyds* v. *Harper*, 16 Ch. Div. 290.
(*l*) *In re Sass*, 1896, 2 Q. B. 12.
(*m*) *Midland R. C.* v. *Silvester*, 1895, 1 Ch. 573.
(*n*) *Balfour* v. *Crace*, 1902, 1 Ch. 733.
(*o*) *Yorkshire Railway Waggon Co.* v. *Maclure*, 19 Ch. Div. 478.
(*p*) *In re FitzGeorge*, 1905, 1 K. B. 462.
(*q*) *In re Moss*, 1905, 2 K. B. 307.

one co-surety executes the guarantee on the faith that the other or others shall execute it also,—and they fail to do so,—the executing surety will not be bound (*r*).

Remedies available for surety.

A surety cannot ordinarily *compel* the creditor to proceed against the debtor; but (upon giving the creditor a sufficient indemnity against the costs of the action) he may, perhaps, require the creditor to proceed against the debtor (*s*); and the surety may himself (*at any moment after the debt becomes payable*) pay the creditor, and then proceed against the debtor (*t*): A surety may also sometimes proceed *quia timet* to compel the debtor to pay the debt (*u*),—as where the creditor has a present right to sue the debtor, and refuses to sue him (*x*),—or demands payment of the surety (*y*).

(1) Surety cannot compel *creditor* to proceed against debtor,—save, *semble*, on giving an indemnity; but may bring action *quia timet*, to compel payment by *debtor*.

A surety may also file a bill for a declaration, that his liability is at an end,—*Scil.*, where the course of dealing between the principal debtor and the creditor has operated as a release (*z*): And, for example, if you are a surety to A. for the rent payable by A.'s tenant B.,—that means, in general, for B.'s rent under his then existing tenancy-agreement,—So that the suretyship extends not to a new tenancy-agreement subsequent (*a*); and the only difficulty arising in that class of case is, to know whether the existing tenancy is (in fact) a new tenancy (*b*), or is only the old tenancy re-continued (*c*). And here note, that the indemnity is not, in such a case, discharged, unless and until A. (the landlord) really gets paid (*d*).

(2) Judicial declaration, that surety discharged.

Where the surety pays the debt on behalf of the principal debtor, the rule (even at law (*e*)) is, that he has a right to call upon the debtor for reimbursement,—a right

(3) Action for reimbursement by debtor.

(*r*) *Evans* v. *Bremridge*, 8 De G. M. & G. 100.
(*s*) *Newton* v. *Charlton*, 10 Hare, 646.
(*t*) *Wright* v. *Simpson*, 6 Ves. 733.
(*u*) *Wooldridge* v. *Norris*, L. R. 6 Eq. 410.
(*x*) *Padwick* v. *Stanley*, 9 Hare, 627.
(*y*) *Ascherson's case*, 1909, 2 Ch. 401.
(*z*) *In re Fox, Walker & Co.*, 15 Ch. Div. 400.
(*a*) *Tayleur* v. *Wildin*, L. R. 3 Exch. 303.
(*b*) *Holme* v. *Brunskill*, 3 Q. B. D. 495.
(*c*) *Nuttall* v. *Staunton*, 4 B. & C. 51.
(*d*) *In re Richardson, Ex parte St. Thomas's Hospital*, 1911, 2 K. B. 705.
(*e*) *Toussaint* v. *Martinnant*, 2 T. R. 105.

which has been put upon the ground of an *implied* contract (on the part of the debtor) to repay the money so paid on his account (*f*): And the surety is (in such a case) subrogated (in fact) to all the creditor's rights (*g*),—*Scil.*, as against the debtor (*h*), and as against the trustee in bankruptcy of the debtor (*i*),—So that, if the creditor is a specialty creditor, so also (after payment) will the surety be (*k*); and if the creditor is the crown, the surety (after payment) will have the priority of the crown (*l*).

(4) Action for delivery up of securities by creditor.

If the creditor has taken some additional (collateral) securities from the principal debtor, the surety is entitled (upon payment of the debt) to have the benefit of all these collateral securities also (*m*): And although this right of the surety used not to extend to those securities (*e.g.*, bonds), which (upon payment) became extinguished (*n*), yet a surety is now entitled, under the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), s. 5, to have assigned to him every security which shall be held by the creditor in respect of the debt, whether it shall or shall not at law be deemed to have been satisfied by the payment of the debt,—the Act operating an *implied* assignment of the security (*o*). And this right of a surety (to the delivery up of the collateral securities) extends also to a surety who is such merely because of having indorsed (and, as indorser, paid) a bill of exchange (*p*): Also, an insurance company (on payment of the loss insured against) is entitled to be put in the place of the person insured (*q*),—So that, if (*e.g.*) the latter should (subsequently) receive from other sources compensation for the loss, the company (having so already paid the loss) will be entitled to recover from him the compensation subsequently received by him (*r*).

(*f*) *Craythorne* v. *Swinburne*, 14 Ves. 162.
(*g*) *Finlay* v. *Mexican Investment Corporation*, 1897, 1 Q. B. 517.
(*h*) *In re Wrexham, &c. R. C.*, 1899, 1 Ch. 440.
(*i*) *Gray* v. *Seckham*, L. R. 7 Ch. App. 680.
(*k*) *Robinson* v. *Wilson*, 2 Madd. 434.
(*l*) *Manisty* v. *Churchill*, 39 Ch. D. 174.
(*m*) *Hodgson* v. *Shaw*, 3 My. & Keen, 190.
(*n*) *Copis* v. *Middleton*, 1 T. & R. 229.
(*o*) *Re M'Myn*, 33 Ch. Div. 575.
(*p*) *Duncan Fox & Co.* v. *North and South Wales Bank*, 6 App. Ca. 1.
(*q*) *Darrell* v. *Tibbitts*, 5 Q. B. D. 560.
(*r*) *Phœnix Office* v. *Spooner*, 1905, 2 K. B. 753.

(5) Action against co-sureties for contribution.

Where there are two or more sureties, and one of them pays the whole debt, he has a right to contribution from his co-surety or co-sureties,—A doctrine which (it has been said) "is bottomed and fixed on general principles of justice, and does not spring from contract, though contract may qualify it" (*s*),—That is to say, the "*common liability*" of all is to be shared by each (*t*): Also, the right to contribution may exist even before actual payment,—as, *e.g.*, when there has been a judgment against the surety for the debt (*u*),—from which date also (and not from the date of the suretyship), time will begin to run against the claim for contribution (*v*). And the law of contribution is applicable, whether the parties are bound in the same or in different instruments,—*provided only they are co-sureties for the same debtor and the same debt*,—that is to say, provided there is a *common liability* and not otherwise (*x*): Also, it makes no difference, if they are bound in different sums,—excepting that the contribution cannot, of course, be required of any of the co-sureties beyond the sums for which they are respectively bound (*y*),—the surety proving nevertheless for the *whole* of the debt, although recovering (in fact) only the co-surety's proportion (*z*).

A surety who has obtained from the principal debtor a counter-security for the liability he has undertaken, is bound to bring into hotchpot (for the benefit of his co-sureties) whatever he receives from that source,—and that, even although he consented to be a surety, only upon the terms of having such counter-security,—and even although the co-sureties (when they entered into the contract of suretyship) were ignorant of the agreement for such counter-security (*a*): But, the principal creditor is not entitled to the benefit of such counter-security (*b*).

(*s*) *Dering* v. *Winchelsea*, 1 Cox, 318.
(*t*) *Johnson* v. *Wild*, 44 Ch. D. 146.
(*u*) *Wolmershausen* v. *Gullick*, 1893, 2 Ch. 514.
(*v*) *Robinson* v. *Harkin*, 1896, 2 Ch. 415.
(*x*) *Smith* v. *Cock*, 1911, A. C. 317.
(*y*) *Coles* v. *Peyton*, 1893, 3 Ch. 238.
(*z*) *Morgan* v. *Hill*, 1894, 3 Ch. 400.
(*a*) *Steel* v. *Dixon*, 17 Ch. D. 825.
(*b*) *Sheffield Banking Co.* v. *Clayton*, 1892, 1 Ch. 621.

Contribution —as between co-directors;

The like right of contribution exists also (in the general case), in favour of one director of a company against his co-directors,—for example, in respect of advances made to the company upon the express suretyship of the directors,—or where (from the loan being unauthorised or otherwise) the company is not liable at all, but the directors making the loan are personally liable (*c*). Also, co-directors (*d*), and co-promoters also (*e*), have,—or may have,—the right to contribution (as against each other) in respect of the damages which either of them has had to pay as *compensation* for statutory frauds in prospectuses and the like:

and as between co-trustees.

And as regards co-trustees, the right of *contribution* (as between them) for losses arising from a breach of trust, is (in the absence of fraud) a matter of course; and such right is enforceable also against the estate of a deceased co-trustee (*f*): On the other hand, the right of *indemnity* (*i.e.*, *recoupment*) is not a matter of course; but where there are special circumstances,—as where (*e.g.*) the trustee who has been the actor in the breach is the solicitor of the trust (or has derived a personal benefit from the breach),—the right of the co-trustee to recoupment would be allowed (*g*). Also, where one of the two trustees is a beneficiary, and the breach of trust (or the judgment therefor against both) is satisfied out of the beneficial interest of the one, he (the beneficiary) has no right to contribution, although both trustees may be in equal blame (*h*). Lastly, as between co-tort-feasors there is no right to contribution (*i*); but the liability of co-directors and of co-promoters for their statutory frauds is not the liability for a *tort* within the meaning of this rule (*k*).

(*c*) *Ramskill* v. *Edwards*, 31 Beav. 100.
(*d*) *Shepheard* v. *Bray*, 1907, 2 Ch. 571.
(*e*) *Gerson* v. *Simpson*, 1903, 2 K. B. 197.
(*f*) *Jackson* v. *Dickinson*, 1903, 1 Ch. 947.
(*g*) *Bahin* v. *Hughes*, 31 Ch. Div. 390.
(*h*) *Chillingworth* v. *Chambers*, 1896, 1 Ch. 685.
(*i*) *Merryweather* v. *Nixan*, 8 T. R. 184.
(*k*) *Gerson* v. *Simpson*, *supra*.

The right to contribution may, of course, be varied by special agreement: For example, where three co-sureties agreed among themselves, that if the principal debtor failed to pay the debt, they should pay only their respective aliquot parts,—and afterwards one of the three went bankrupt, and one of the other two paid the whole debt, he was held entitled to recover only one-third from the third co-surety (*l*),—each of the two having also, of course, a right to prove in the bankruptcy, to get what they could get therein, but not exceeding one-third (*m*).

Surety and guarantee,—are not, in the general case, co-sureties.

Where there is a surety for the principal debtor, and the creditor has obtained also (for his greater protection) some guarantee or insurance (say, from a guarantee society), against the default of the principal debtor to pay the debt,—The question sometimes arises, whether the surety is liable before (and in exoneration of) the insurer or guarantor, or is liable only *pro ratâ* with (and *pari passu* with) the latter: And it appears, that the surety is (in the general case) liable in exoneration of the insurer or guarantor (*n*),—and for this purpose, it will not matter, that the surety has not been (and he would not ordinarily be) a party to the instrument of guarantee.

Surety can only charge debtor for what he actually paid.

Where a surety discharges an obligation at a less sum than its full amount, he cannot (as against the principal debtor) make himself a creditor for the whole amount, but can only claim what he has actually paid in discharge of the debt (with interest (*o*)),—In which particular, the transferee of a mortgage debt (who is neither a trustee nor a surety) is in a very different position, being entitled to claim the full amount of the mortgage debt, although he should have obtained the transfer at a considerably lower price (*p*); and an inquiry will sometimes be directed, as to whether the transferee is (or is not) in a fiduciary capacity (*q*).

(*l*) *Swain* v. *Wall*, 1 Ch. R. 149.
(*m*) *In re Parker*, 1894, 3 Ch. 400.
(*n*) *In re Denton's Estate*, 1904, 2 Ch. 118.
(*o*) *Reed* v. *Norris*, 2 My. & Cr. 361, 375.
(*p*) *Dobson* v. *Land*, 8 Ha. 216, at p. 220.
(*q*) *Batchelor* v. *Middleton*, 6 Ha. 75.

Circumstances discharging the surety:—(1) If creditor varies contract with debtor, without surety's privity.

A surety will be discharged from his liability, where (by acts *subsequent* to the contract of suretyship) his position has been essentially changed without his consent (*r*); but the consent will sometimes be implied,—as between (*e.g.*) a lessee and his assignee (*s*). However, if the variation is in relief *pro tanto* of the surety, he will not be thereby discharged (*t*); and if there be co-sureties, and the variation in no way affects them *inter se*, they cannot claim to have been *inter se* discharged thereby (*u*). But, surely, it is for the surety to judge of the effect of the variation?

(2) If creditor gives time in a binding manner to debtor, without consent of surety,—and thereby affects the remedies of the surety.

If a creditor (without the consent of the surety) *gives time* to the principal debtor (by *positive contract* between the creditor and the principal debtor), the surety is discharged thereby (*x*): And, in the case of mortgage debts, this rule extends not only to discharge the surety from his *personal* liability on his covenant to pay the mortgage debt (*y*), but extends also (it has been said) to release the mortgaged property of the surety (where he is a surety co-mortgagor) from its liability to the charge (*z*). But, *semble*, it may be, that (under a special suretyship) the surety's liability *as co-mortgagor* may remain,—*Scil.*, as regards the mortgaged hereditaments,—even where the principal debtor's personal liability for the debt is wholly gone (*a*). Also, where the debt for which the surety was bound was a debt payable by three equal monthly instalments; and the surety was bound for each of the three instalments; and the creditor (without the assent of the surety) gave the debtor time for the *first* instalment,—The surety was held to have been discharged as to that instalment only, and not also as regards the two remaining instalments (*b*); Also, *nota bene*, if the debt is a bill of exchange or promissory note (which has been successively negotiated by indorsement),

Debt payable by instalments,—giving time as to one of the instalments, effect of, as regards the other instalments.

(*r*) *Bonser* v. *Cox*, 6 Beav. 110.
(*s*) *Baynton* v. *Morgan*, 22 Q. B. D. 74.
(*t*) *Webster* v. *Petre*, 4 Exch. Div. 127.
(*u*) *Greenwood* v. *Francis*, 1899, 1 Q. B. 312.
(*x*) *Samuel* v. *Howarth*, 3 Mer. 272.
(*y*) *Bolton* v. *Buckenham*, 1891, 1 Q. B. 278.
(*z*) *Bolton* v. *Salmon*, 1891, 2 Ch. 48.
(*a*) *Percy* v. *N. P. Bank*, 1910, W. N. 20.
(*b*) *Croydon Gas* v. *Dickinson*, 2 C. P. D. 46.

and you give time to one of the indorsers, you thereby discharge all the indorsers *subsequent* to him, but these indorsers only,—the *prior* indorsers not being affected by that.

(2a) Surety not discharged, where creditor giving time reserves his rights against surety.

A surety will not be discharged by the creditor's giving time to the debtor, if the creditor's remedies against the surety are thereby accelerated,—*Scil.*, because (in such a case) the surety's remedies against the principal debtor remain unaffected (*c*): Nor will the surety be discharged, if the giving of time to the principal debtor is (either *expressly* or *impliedly*) sanctioned by the original agreement of suretyship (*d*). Also, generally, the surety will not be discharged, if the creditor (on giving further time to the principal debtor) *reserves* his right to proceed against the surety,—*Scil.*, because when that right is so reserved, the principal debtor cannot say it is inconsistent with giving him time, that the creditor should be at liberty to proceed against the sureties, and that they (in their turn) should afterwards proceed against him; and the question, whether or not the surety was informed of the agreement, is wholly immaterial (*e*).

(3) If the creditor releases the principal debtor,—effect.

The same rule is applicable, where the principal debtor purports to be released, and the creditor (at the same time) reserves his rights against the surety,—Excepting that, where the purported release is an absolute one, or is in general terms, *and* without any reservation of rights against the surety, the surety will be discharged,—and that not from any equity in his favour, but from considerations of bare justice to the principal debtor (*f*): And in the case of co-sureties, the release of one of them by the creditor (even when founded on a mistake of law) operates as a release also of the others (*g*),—although, if the release is merely a *covenant not to sue* (*h*), it will not operate

(3a) If the creditor releases one co-surety,—effect.

(*c*) *Clarke* v. *Birley*, 41 Ch. Div. 422.
(*d*) *Rouse* v. *Bradford Bank*, 1894, A. C. 586.
(*e*) *Webb* v. *Hewitt*, 3 K. & J. 442.
(*f*) *Tasmania Bank* v. *Jones*, 1893, A. C. 313.
(*g*) *Sydney Bank* v. *Taylor*, 1893, A. C. 317.
(*h*) *Nicholson* v. *Revill*, 4 A. & E. 675.

to release the co-sureties (*i*). But it is to be particularly observed, that a creditor cannot reserve his rights against the sureties, if he give to the principal debtor an *actual release* (as distinguished from a mere purported release or covenant not to sue),—For (on a *release*) the debt is gone (*k*),—and there can be no surety for a debt that is wholly gone (*l*): *Secus*, where the debt is not wholly gone,—as where the release is a *qualified* release, and by operation of law only (*m*). Also, *nota bene*, an accord and satisfaction with the principal debtor would be equivalent to an actual release,—and to reserve (in that case) any rights against the surety would be inconsistent with the *accord* (*n*).

Compositions, statutory and common law,—rights against surety, reserved.

But, *nota bene*, although the principal debtor will be discharged, by a statutory composition (*o*),—equally as by a bankruptcy or liquidation,—Still the statute under which that discharge arises may (and usually does) expressly continue the liability of the surety (*p*): And, in the case of a common law composition also, the liability of the surety may be continued by express reservation (*q*), —but (unless so continued) it is discharged (*r*): Further, *nota bene*, in the winding up of a limited company,—with A. contributories and B. contributories, a compromise with an A. contributory does not operate to release the correlative B. contributory (*s*),—and, in such a case, the B. contributory will, therefore, have, notwithstanding the compromise, a right to indemnity from the A. contributory (*t*); and that is so, although the A. contributory and the B. contributory do not stand in the relation of debtor and surety.

(4) If creditor loses securities, or allows

Inasmuch as a surety is entitled (on payment of the debt) to all the securities which the creditor has ever had,

(*i*) *Ward* v. *National Bank of New Zealand*, 8 App. Ch. 755.
(*k*) *Kearsley* v. *Cole*, 16 Mee. & W. 136.
(*l*) *Stacey* v. *Hill*, 1901, 1 Q. B. 660; *Letton's case*, 1908, 1 K. B. 378.
(*m*) *In re Jacobs*, L. R. 10 Ch. App. 211.
(*n*) *Head* v. *Head*, 1894, 2 Ch. 236.
(*o*) *Flint* v. *Barnard*, 22 Q. B. D. 90.
(*p*) *Ellis* v. *Wilmot*, L. R. 10 Exch. 10.
(*q*) *Bateson* v. *Gosling*, L. R. 7 C. P. 9.
(*r*) *Cragoe* v. *Jones*, L. R. 8 Exch. 81.
(*s*) *Nevill's case*, L. R. 6 Ch. App. 43.
(*t*) *Roberts* v. *Crowe*, L. R. 7 C. P. 729.

—whether such securities were given at the time of (*u*) or after (*x*) the contract of suretyship, and with or without the knowledge of the surety,—If the creditor loses the securities, or suffers them to get back into the possession of the debtor,—or does not make them effectual (by giving the proper notice (*y*), or by duly registering them (*z*)),—the surety, *to the extent of the securities which have so been lost*, will be discharged (*a*). Also, the surety will, *semble*, be discharged to the extent of any rights of action or other benefits which the creditor has given up or renounced (*b*).

them to go back into debtor's hands,—effect.

All the general rules regarding the marshalling of securities which are stated and illustrated in the chapter on Marshalling Assets, *supra*, are applicable as against sureties also (*c*); and the order of working out the successive redemptions and foreclosures of mortgaged estates, stated in the chapter on Mortgages, *supra* (*d*), is applicable also to sureties,—being subject (as against sureties also) to the doctrine of consolidation, stated and illustrated in the same chapter, but now greatly cut down by the Conveyancing Act, 1881: But regarding sureties in mortgage deeds, the distinctions, which are stated on p. 277, *supra*, must always be borne in mind,—it making a very great difference indeed, whether the surety is a surety simply or is also a co-mortgagor: Also, *nota bene*, neither foreclosure nor sale may (under the exceptional circumstances of some particular suretyship) be available as against the surety's estate (*e*).

Marshalling of securities,—as against sureties.

Where the principal debtor becomes a bankrupt, both the creditor and the surety have, on principle, a right of proof in the bankruptcy,—the creditor, in respect of his

On bankruptcy of principal debtor.—proof against his

(*u*) *Mayhew* v. *Crickett*, 2 Swanst. 185.
(*x*) *Berridge* v. *Berridge*, 44 Ch. Div. 168.
(*y*) *Strange* v. *Fooks*, 4 Giff. 408.
(*z*) *Wulff* v. *Jay*, L. R. 7 Q. B. 758.
(*a*) *Taylor* v. *Bank of New South Wales*, 11 App. Ca. 596.
(*b*) *West of England Insurance* v. *Isaacs*, 1897, 2 Q. B. 377.
(*c*) Pp. 228, 229.
(*d*) Pp. 282, 283 *et seq.*
(*e*) *Stamford Bank* v. *Ball*, 4 De G. F. & J. 310.

estate, by creditor and by surety.

debt; and the surety, in respect of his liability: But, in practice, the following distinction is to be taken, namely:

(1) Where the surety is a surety for the *whole* debt, the creditor (and he only) shall prove,—and shall take to himself, and also keep for himself, the dividends received on both proofs (*f*),—proceeding afterwards against the surety in respect of the deficiency; but

(2) Where the surety is a surety for only *part* of the debt, *and he has paid that part to the principal creditor*,—Then he (the surety) may prove (in respect of that part); and the creditor also may prove, in respect of his WHOLE original debt (and not merely for the residue after deducting the part paid by the surety (*g*)),—Each keeping to himself (in this case) the dividends received by him (*h*), but the principal creditor not, of course, receiving more than 20*s*. in the £ altogether: But, unless the surety has first paid his part, he cannot prove,—The law not permitting a "*double proof*" in respect of the same debt (*i*), —but only in respect of distinct debts (*k*).

Time,—when a bar in favour of the surety, and when not.

Where the principal debtor has been discharged by the Statute of Limitations, the surety may or may not have been also discharged thereby,—according as the bar by time extinguishes the debt itself, or only bars the remedy for it: But the payment of interest by the principal debtor will keep alive the debt against the surety also,—as will also any part-payment of the principal of the debt (*l*): That is to say,—The 19 & 20 Vict. c. 97, s. 14 (as regards co-contractors and co-debtors), is inapplicable to the relation of creditor, principal debtor, and surety, these two latter not being *co-debtors* within the meaning of that Act and section (*m*),—So that a part-payment by the principal debtor, although it would not operate (as against any co-debtor or co-debtors) as an acknowledgment to revive the debt, will (as against the surety)

(*f*) *Ellis* v. *Emmanuel*, 1 Exch. Div. 157.
(*g*) *In re Sass*, 1896, 2 Q. B. 12.
(*h*) *Hobson* v. *Bass*, L. R. 6 Ch. App. 792.
(*i*) *In re Oriental Bank*, L. R. 7 Ch. App. 99.
(*k*) *Re Parkers*, 19 Q. B. D. 84.
(*l*) *Allison* v. *Frisby*, 43 Ch. D. 106.
(*m*) *Lindsell* v. *Phillips*, 30 Ch. D., on pp. 295, 296.

operate as such an acknowledgment: But where a customer's account at the bank was guaranteed by a surety, and more than six years had run since the last advance, *and there had been no actual payments since, but only settlements in account* (charging interest and commission in the usual way),—The surety was held to have been discharged, as regards the *principal* of the sums advanced (*n*),—and to remain liable only as regards the *interest* and *commission* accrued within the six years.

Account of customer of bank,—surety for, discharge of.

(*n*) *Parr's Bank* v. *Yates*, 1898, 2 Q. B. 460.

CHAPTER VI.

PARTNERSHIP.

Jurisdiction in equity.

THE jurisdiction of equity in partnership matters, although nominally concurrent, was practically exclusive, —a quasi-fiduciary relation existing between partners; and the Judicature Act, 1873 (s. 34), accordingly, assigned to the Chancery Division all partnership matters involving either accounts or a dissolution. The whole law of partnership has been declared by the Partnership Act, 1890 (53 & 54 Vict. c. 39),—but the rules of equity (and indeed of the common law generally) continue in force (s. 46).

Specific performance of partnership agreement,—when and when not decreed.

A Court of Equity will, occasionally, decree the specific performance of a contract to enter into a partnership,—That is to say, where the contract is for a fixed and definite period of time (*a*), *and there have been acts of part performance* (*b*); but the Court will not otherwise decree the specific performance of the contract (*c*): Also, where A. and B. agree to be partners for a term certain, —the term not to be determinable by the death of either; and A. dies during the term; and A.'s executors refuse to continue the partnership,—The Court will not compel them to do so; but (for breach of their testator's contract) they must pay the damages (if any) which B. sustains thereby (*d*).

Injunction,—when and when not granted.

Equity will, however, decree specific performance of *particular clauses* in the articles of an existing partnership (*e*): And where, by a clause in the articles, the

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(*a*) *Buxton* v. *Lister*, 3 Atk. 385.
(*b*) *Scott* v. *Rayment*, L. R. 7 Eq. 112.
(*c*) *Hervey* v. *Birch*, 9 Ves. 357.
(*d*) *Downs* v. *Collins*, 6 Ha. 418.
(*e*) *Marshall* v. *Colman*, 2 J. & W. 266.

partners agree not to engage in any *other* business, equity will (by injunction) enforce such a clause,—the interim profits made by any partner in violation of the agreement being usually decreed to belong to the partnership (*f*): Also, the law is the same (as regards carrying on any "*rival*" business), even where there is no such express restrictive agreement (*g*),—a "*rival*" business being, of course, one of similar character, and not one of a wholly different character (*h*). And equity will also (by injunction) prevent such acts (on the part of any of the partners) as either tend to the destruction of the partnership property (*i*), or as tend to exclude any of the partners from the due exercise of their partnership rights (*k*).

Relief by injunction generally,—when and when not.

But equity will not interfere, either by injunction or otherwise, where the remedy at law is adequate: Also, since the Common Law Procedure Act, 1854,—and more particularly since the Arbitration Act, 1889,—equity has been (and is) in the habit of remitting the parties to the arbitration as their self-chosen exclusive forum (*l*), —Provided always that the question in difference is within the agreement for reference (*m*), and the whole dispute may be settled in the arbitration, and not otherwise (*n*), and not so as to split up the ground of action (*o*). And the Court justifies its action in enforcing these references, under the express words contained in s. 4 of the Act of 1889 (which re-enacts s. 11 of the Common Law Procedure Act, 1854), namely,—That whenever the parties to any deed or instrument in writing agree to refer their disputes, and any one or more of them nevertheless commences an action (relative to such disputes), the other parties (being defendants to the action) may,—*before pleading thereto* (*p*), *or taking any other step in the*

Where an agreement to refer to arbitration,—stay of proceedings, very commonly directed, on ground of agreement to refer.

(*f*) *Somerville* v. *Mackay*, 16 Ves. 382.
(*g*) 53 & 54 Vict. c. 39, s. 30.
(*h*) *Dean* v. *M'Dowell*, 8 Ch. D. 345.
(*i*) *Marshall* v. *Watson*, 25 Beav. 501.
(*k*) *Walker* v. *Mottram*, 19 Ch. Div. 355.
(*l*) *Willesford* v. *Watson*, L. R. 14 Eq. 572.
(*m*) *Martin's case*, 17 Q. B. D. 609.
(*n*) *Barnes* v. *Youngs*, 1898, 1 Ch. 414.
(*o*) *Ives* v. *Willans*, 1894, 2 Ch. 478.
(*p*) *Bartlett* v. *Ford's Hotel*, 1896, A. C. 1.

action (*q*),—apply for a *stay* of the proceedings, on the ground of the agreement to refer; and the Court, "upon being satisfied that no sufficient reason exists (*r*) why the matter in dispute ought not to be referred," *may* (in its judicial discretion (*s*)) make an order staying the proceedings, provided the applicants have always been (and are) ready and willing to join and concur in all matters necessary or proper for causing the dispute to be decided by arbitration. However, the order to stay will first appoint a receiver and manager (wherever the business appears to require that (*t*)),—and will also (usually) reserve liberty to apply: Under which liberty, the Court may afterwards either give its direction to the arbitrators (*u*), or make such other order (even an order revoking the submission) as shall (in the circumstances) be proper (*x*): Also, in and by the award, the arbitrators or umpire may award even, that the partnership shall be dissolved (*y*),—although either party may apply to the Court, to remit the award or to set it aside, if there is any sufficient ground for that; but it is, usually, very difficult,—and (in the absence of *mala fides*) almost impossible,—to get the Court to leave the action to simply proceed (*z*).

Partnership,—constitution of.

A partnership is constituted by agreement (express or implied); and there is scarcely any variety of term (not being, of course, illegal (*a*)), which may not be included in the agreement; and a partner may (by the agreement) have the right of nominating his successor in the partnership (*b*). Also, persons become partners, if they agree to go shares in the profits *and* losses of the business (*c*),—although merely sharing in the profits (without being at the same time liable also for the losses, and without being invested with the capacity of agent for self and co-part-

(*q*) *Richardson* v. *Le Maitre*, 1903, 2 Ch. 222.
(*r*) *Freeman's case*, 1911, 1 K. B. 783.
(*s*) *Renshaw* v. *Queen Anne's Mansions*, 1897, 1 Q. B. 662.
(*t*) *Pini* v. *Roncoroni*, 1892, 1 Ch. 633.
(*u*) *Hart* v. *Duke*, 32 L. J. Q. B. 55.
(*x*) *Jackson* v. *Barry R. C.*, 1893, 1 Ch. 238.
(*y*) *Vawdrey* v. *Simpson*, 1896, 1 Ch. 166.
(*z*) *Cox* v. *Hutchinson*, 1910, 1 Ch. 573.
(*a*) *Nash* v. *Ash*, 1 Eden, 378 (citing the highwayman's case).
(*b*) *Byrne* v. *Reid*, 1902, 2 Ch. 735.
(*c*) *Walker* v. *Hirsch*, 27 Ch. Div. 460.

ner (*d*)), will not constitute a man a partner. Also, a mere part-ownership is not a partnership,—whether the profits (of the common property) are shared between the part-owners or not (*e*). Also, in the absence of any stipulation to the contrary, the shares of the partners in the capital (and in the profits and losses) are equal (*f*); and where (in the partnership agreement between the plaintiff and the defendant) it had been arranged, that a certain cotton mill of the plaintiff's (taken at its then value) should be deemed the plaintiff's capital in the business, and that £*x* cash should be the defendant's capital therein; and, upon a winding up of the partnership, the mill was (unexpectedly) found to have then become of treble its original value,—The Court said, that the excess in the value was divisible as "*profit*" (*g*),—just as, *per contra*, any unexpected "*loss*" would have had to be shared (*h*). Also, if there are three partners, and the partnership sustains a heavy loss, and one of the three goes bankrupt,—The loss falls on the other two, so far as the bankrupt's estate is insufficient to bear the bankrupt's share of it (*i*). And lastly, where a partnership was originally for an agreed term, and it continues after the term,—It becomes a partnership at will, upon all such of the old terms as are applicable to a partnership at will (*k*),—including, it may (*l*) or may not (*m*) be, the term under which an option of purchase is given to either partner:

Partnership,—terms of.

A partnership may be dissolved in divers ways:—

(1) Firstly, By Operation of Law,—That is to say, by the death of one of the partners (unless there be an express stipulation to the contrary); or by the bankruptcy of one of the partners,—or, *semble*, by his conviction for felony. But an assignment by one of the partners,

Partnership,—dissolution of.

(1) By operation of law.

(*d*) *Cox* v. *Hickman*, 8 H. L. Ca. 268.
(*e*) 53 & 54 Vict. c. 39, s. 2.
(*f*) 53 & 54 Vict. c. 39, s. 24.
(*g*) *Robinson* v. *Ashton*, L. R. 20 Eq. 25.
(*h*) *Moore* v. *Knight*, 1891, 1 Ch. 547.
(*i*) *Lowe* v. *Dixon*, 16 Q. B. D. 455.
(*k*) *King* v. *Chuck*, 17 Beav. 325.
(*l*) *Daw* v. *Herring*, 1892, 1 Ch. 284.
(*m*) *Clark* v. *Leach*, 1 De G. J. & S. 409.

although it used to operate to determine the partnership (*n*), will not now so operate (*o*).

(2) By agreement of the parties.

(2) Secondly, By Mutual Agreement,—That is to say, if *all* the partners agree to dissolve; and by virtue of a clause in the articles, an effective notice of dissolution may also be given by one or more of the partners without the consent of *all* (*p*),—In which latter case, the Court will (where necessary) compel the other partners to sign a notice of dissolution for the *Gazette* (*q*): Also, any partnership, the duration of which is indefinite, may (by notice) be dissolved by any partner at any moment he pleases,—provided only he be acting honestly in giving the notice (*r*); but the Court would (in such a case) restrain an immediate dissolution of the partnership, if irreparable mischief might ensue therefrom (*s*): Also, a partnership may, without any notice to dissolve it, merely expire by the accomplishment of the object for which it was established; and (*e.g.*) a mining partnership (not uncommonly) endures only during the term of the mineral lease (*t*).

(3) By decree of Court,—on sufficient grounds.

(3) Thirdly, By Decree in Equity,—And as regards this mode of dissolution, it has been enacted (by the Partnership Act, 1890, s. 35), that the Court may dissolve the partnership, wherever it is "*just and equitable*" to do so:

Also, under that Act (and even apart from that Act), the Court will decree a dissolution, on the divers specific grounds following, that is to say:—

(1) Where the partnership has originated in fraud or oppression (*u*);

(2) Where one partner grossly misconducts himself in reference to the partnership (acting in persistent breach of the partnership articles (*x*));

(3) Where one of the partners persists in carrying on

(*n*) *Heath* v. *Sansom*, 4 B. & Ad. 172.
(*o*) *Garwood* v. *Paynter*, 1903, 1 Ch. 236.
(*p*) *Hall* v. *Hall*, 12 Beav. 414.
(*q*) *Hendry* v. *Turner*, 32 Ch. Div. 335.
(*r*) *Neilson* v. *Mossend Iron Co.*, 11 App. Ca. 298.
(*s*) *Levy* v. *Walker*, 10 Ch. Div. 436.
(*t*) *Burdon* v. *Barkus*, 4 De G. F. & J. 42.
(*u*) 53 & 54 Vict. c. 39, s. 41.
(*x*) 53 & 54 Vict. c. 39, s. 35.

the business in a manner totally different from that agreed on (*y*);

(4) Where a partner, who ought to attend personally to the business, permanently absents himself from it, or becomes so engrossed in his own private affairs as to be unable to attend to it (*z*); and

(5) Where the disagreements between the partners are so great as to render it impossible to carry on the business,—*all mutual confidence being destroyed* (*a*).

In the case of a dissolution by the Court, the dissolution usually takes effect from the date of the decree (*b*); but if the dissolution is on the ground firstly above mentioned, the dissolution will be as from the commencement of the partnership (*c*).

Dissolution on the ground of insanity of the partner whose skill is indispensable.

Where a partner, who is required to contribute his personal skill to the business, becomes insane, equity may on the ground of the insanity dissolve the partnership (*d*); or the Court will restrain the insane partner from interfering in the partnership business (*e*).

Account, only on a dissolution,—or on a case for a dissolution.

Where a dissolution has taken place, an account will be decreed, and (if necessary) a receiver appointed; but an account will not be decreed, or a receiver appointed, unless with the view to a dissolution (*f*),—excepting that where the conduct of a partner has been such as would entitle his co-partner to a dissolution, an account (up to the time of commencing the action) may be decreed without a dissolution (*g*).

Terms of dissolution,—as to return of premium;

Upon a dissolution, the Court will (in a proper case) order the defendants to repay to the plaintiff a due pro-

(*y*) *Waters* v. *Taylor*, 2 V. & B. 299.
(*z*) *Smith* v. *Mules*, 9 Hare, 556.
(*a*) *Watney* v. *Wells*, 30 Beav. 56.
(*b*) *Lyon* v. *Tweddell*, 17 Ch. Div. 529.
(*c*) *Rawlins* v. *Wickham*, 1 Giff. 355.
(*d*) *Rowlands* v. *Evans*, 30 Beav. 302.
(*e*) *J*——— v. *S*———, 1894, 3 Ch. 72.
(*f*) *Taylor* v. *Neate*, 39 Ch. Div. 538.
(*g*) *Fairthorne* v. *Weston*, 3 Hare, 387.

portion of any premium paid by him as the price of his having become a partner (*h*); but if that relief is desired, a case must be made for it at the trial of the action (*i*),—and not (except in very exceptional cases) afterwards (*k*).

and generally: In settling the accounts between the partners on a dissolution, the provisions in that behalf contained in the partnership articles must, generally, be oberved,—including the provision (if any) which makes the "*last signed*" account conclusive (*l*), and including the option-clause (if any) which gives to either partner the right to purchase the share or shares of the other partner or partners (*m*): And, subject to the relevant provisions (if any) contained in the partnership articles, the provisions applicable upon the dissolution, are those contained in s. 44 of the Partnership Act, 1890,—that is to say: Firstly, the losses of the partnership (including losses and deficiencies of capital) are to be paid or made good,—*Scil.*, first out of profits, next out of capital, and lastly by the partners individually according to their respective proportions of the profits; And Secondly, the assets (including the sums, if any, contributed by the partners to make good the losses aforesaid) are to be applied:—

(1) In paying the outside debts and liabilities of the partnership;

(2) In paying all advances made by the partners beyond their capital; and

(3) In paying out the capital of the partners;

And after all such payments made, the ultimate residue (if any) will be divided among the partners as profits in the proportions in which the profits are divisible (*n*): But, if the dissolution is proceeding under an order of the Court, the payment of *the costs of the action* will be provided for *before* repayment of their capitals to the part-

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(*h*) *Belfield* v. *Bourne*, 1894, 1 Ch. 521.
(*i*) *Wilson* v. *Johnstone*, L. R. 16 Eq. 606.
(*k*) *Edmonds* v. *Robinson*, 29 Ch. Div. 170.
(*l*) *Hunter* v. *Dowling*, 1893, 1 Ch. 391.
(*m*) *Watts* v. *Driscoll*, 1901, 1 Ch. 294.
(*n*) *Garner* v. *Murray*, 1904, 1 Ch. 57.

ners, these costs falling on the respective partners in proportion to their shares in the partnership (*o*).

Partner making advantage out of the partnership property, accountable to other partners.

A partnership, expiring on death, effluxion of time, or bankruptcy, does not really expire until the partnership affairs have been wound up (*p*): And in the winding up, the partner or partners who continue the business are accountable to the others,—not merely for the ordinary profits, but for all (if any) the advantages accruing from the business (*q*); and, if there are no such profits, the partner or partners who shall have so continued the business will, in general, have no remuneration for his or their trouble (*r*),—but only their just expenditure (*s*).

Representatives of deceased partner have no lien.

There is no fiduciary relation between the surviving partner and the representatives of a deceased partner,—so that the rights of the representatives being mere legal rights, the Statutes of Limitation will be applicable (*t*), —Excepting that these statutes, in a case of fraud, run only from the date of the discovery of the fraud (*u*). Also, the representatives of a deceased partner have no lien on the partnership estate,—Which estate accrues, therefore, in its entirety (both at law and in equity) to the surviving partner or partners,—So that the surviving partner or partners may mortgage the partnership assets, and either for a present partnership advance (*x*), or for a past partnership debt (*y*), and so as to give the mortgage priority over the rights of the deceased partner's estate (*z*).

Valuation in lieu of *sale*, when and when not?

But bankruptcy is unlike death in these particulars,—the bankrupt partner's share vesting in the trustee of the bankruptcy,—and that notwithstanding any clause to the contrary in the articles of partnership (*a*): It is, how-

(*o*) *Ross* v. *White*, 1894, 3 Ch. 326.
(*p*) *Crawshay* v. *Collins*, 2 Russ. 344.
(*q*) *Clements* v. *Hall*, 2 De G. & J. 173.
(*r*) *Aldridge* v. *Aldridge*, 1894, 2 Ch. 97.
(*s*) *Burdon* v. *Barkus*, 4 De G. F. & J. 42.
(*t*) *Knox* v. *Gye*, L. R. 5 H. L. 656.
(*u*) *Betjemann* v. *Betjemann*, 1895, 2 Ch. 474.
(*x*) *Bucknall* v. *Dresser*, 4 D. M. & G. 542.
(*y*) *Bradford Bank* v. *Cure*, 31 Ch. Div. 324.
(*z*) *Bourne* v. *Bourne*, 1906, 2 Ch. 427.
(*a*) *Collins* v. *Barker*, 1893, 1 Ch. 578.

ever, lawful, *semble*, to pay to the trustee in the bankruptcy the bankrupt's share at a *valuation* (*b*),—just as (in the case of a private limited company) the compulsory purchase of that share at a fixed price would be lawful (*c*): And otherwise a sale (and not a valuation) must be made (*d*).

Judgment debt,—charge for, on partner's share, and realisation of such charge.

As regards realising out of the partnership assets a judgment obtained against an individual partner, in lieu of execution issuing on such judgment, the Court may *now* make an order *charging* the partner's share with the separate judgment debt and with interest thereon; and the Court may also appoint a receiver towards the realisation of the charge,—Every such charge having the same effect as a voluntary charge given by the judgment debtor (*e*), and being subject to the soliciter's lien (if any (*f*)), and to the state of the accounts between the judgment debtor and his co-partners (*g*).

In equity, land forming an asset of the partnership is money.

The share of a deceased partner is his proportion of the partnership assets *after all the debts are paid*, and it is only that which passes to his legal representatives(*h*), —or to any purchaser (or mortgagee) of the share(*i*): And inasmuch as a sale is necessary in order to ascertain the share, therefore (in equity) the share must (as between the real and personal representatives of the deceased partner) be deemed to be personal (and not real) estate (*k*): And not only are lands purchased out of partnership funds for partnership purposes treated in equity as personalty, but the rule is the same, even where the lands have been acquired by *devise*,—provided the devised lands have "*been involved in the business*" (*l*). But, under special circumstances, the lands may still remain real estate of the deceased partner (*m*),—and (in

(*b*) *Whitmore* v. *Mason*, 2 J. & H. 204.
(*c*) *Borland's Trustee* v. *Steel Brothers*, 1901, 1 Ch. 279.
(*d*) *Burdon* v. *Barkus*, 4 De G. F. & J. 42.
(*e*) *Brown Janson & Co.* v. *Hutchinson*, 1895, 1 Q. B. 736.
(*f*) *Ridd* v. *Thorne*, 1902, 2 Ch. 344.
(*g*) *Garwood* v. *Paynter*, 1903, 1 Ch. 236.
(*h*) *Noyes* v. *Crawley*, 10 Ch. D. 31.
(*i*) *Dodson* v. *Downey*, 1901, 2 Ch. 620.
(*k*) *Davies* v. *Davies*, 1894, 1 Ch. 393.
(*l*) *Waterer* v. *Waterer*, L. R. 15 Eq. 402.
(*m*) *Balmain* v. *Shore*, 9 Ves. 500.

favour of a specific devisee) will, usually, so remain,—at least, when the partnership is solvent (*n*).

Creditors may on decease of one partner go against survivors, or against the estate of deceased:

As regards the partnership debts,—being debts the liability for which accrued before the death of the deceased partner (*o*), but not otherwise (*p*):—The creditors may either pursue their legal remedies against the survivors, or (at their option) resort in equity to the estate of the deceased (*q*); but the estate of the deceased partner will be discharged by any long delay in proceeding against it (*r*).

(1) Separate creditors being paid out of separate estate before partnership creditors.

The liability of partners, although sometimes called a joint and several liability (in respect of every matter falling within the scope of the business), differs in important particulars from a joint and several liability (*s*), —That is to say, although the separate estate of the deceased partner is liable, *yet it is liable only as for a joint debt:* Consequently, the separate creditors of the deceased partner are entitled to be paid their debts (in full), before the creditors of the partnership can claim anything, from his separate estate (*t*); and if a partnership creditor should (as he may) institute proceedings for the administration of the estate of the deceased partner, and (his debt being a joint debt only) there is a *constat* at the hearing, that the separate estate will leave no surplus (after payment of the separate creditors), his action will be dismissed (*u*). Also, a creditor of the partnership, who is indebted to the deceased partner individually, cannot (in an administration of the deceased partner's estate) set off his separate debt against the joint debt due to him (*x*): But a joint debt, which has been contracted in fraud of any of the partners, may (at the option of the creditor) be treated either as a joint or as a separate debt (*y*); and such a debt may also (under the

(*n*) *Brettell* v. *Holland*, 1907, 2 Ch. 88.
(*o*) *Court* v. *Berlin*, 1897, 2 Q. B. 396.
(*p*) *Bagel* v. *Miller*, 1903, 2 K. B. 212.
(*q*) *Matheson* v. *Ludwig*, 1896, 2 Ch. 836.
(*r*) *Way* v. *Barrett*, 5 Ha. 55.
(*s*) *Kendall* v. *Hamilton*, 4 App. Ca. 538.
(*t*) *Ex parte Wilson*, 3 M. D. & De G. 57.
(*u*) *Edwards* v. *Barnard*, 32 Ch. Div. 447.
(*x*) *Stephenson* v. *Chiswell*, 3 Ves. 566.
(*y*) *In re Davidson*, 13 Q. B. D. 50.

special circumstances of the case) be and continue a separate debt only, without any option in the creditor(*z*). But debts arising on "*distinct contracts*" may be entitled to a sort of "*double proof*" (*a*),—*i.e.*, against both the joint and the separate estates concurrently.

(2) Partnership creditors being paid out of partnership funds before separate creditors.

The joint creditors have, of course, a right to be first paid their debts out of the partnership funds (before the separate creditors receive anything),—and that, even although the partnership should be ostensible only (*b*); and this preference is commonly stated to result from the equity of the co-partners over the *whole* fund (*c*). But the executors of a deceased co-partner (who was also a creditor of the firm) cannot, in general, prove in competition with the outside joint creditors (*d*),—but they come in next after these outside creditors (*e*): Also, persons who (without becoming partners) lend money to the partnership, upon an agreement to receive a share of the profits in lieu of interest on the loan (*f*),—or who are entitled to receive a share of the profits, in respect of their having sold the goodwill of the business to the partnership (*g*),—are (in the case of the bankruptcy or insolvency of the partnership) postponed to the other partnership creditors.

Goodwill,—an asset.

Goodwill,—assignment of, when necessary.

The goodwill of the business is, in general, an asset of the partnership (*h*),—unless it is a merely personal goodwill (*i*); and, accordingly, on the *retirement* of a partner, the assignment which he executes should expressly extend to assigning the goodwill,—so as to pass the right to use the name of the retiring partner in the partnership style (*k*); and should contain also a clause restraining the retiring partner from starting any rival business (*l*).

(*z*) *British Homes* v. *Paterson*, 1902, 2 Ch. 404.
(*a*) *In re Parkers*, 19 Q. B. D. 84.
(*b*) *Ex parte Blythe*, 16 Ch. Div. 620.
(*c*) *Lacey* v. *Hill*, 4 Ch. Div. 537.
(*d*) *Ex parte Andrews*, 25 Ch. Div. 505.
(*e*) *Nanson* v. *Gordon*, 1 App. Ca. 195.
(*f*) *In re Mason*, 1899, 1 Q. B. 810.
(*g*) 53 & 54 Vict. c. 39, s. 3.
(*h*) *Vernon* v. *Hallam*, 34 Ch. Div. 749.
(*i*) *Cooper* v. *Metropolitan Board of Works*, 25 Ch. Div. 472.
(*k*) *Thorneloe* v. *Hill*, 1894, 1 Ch. 569.
(*l*) *Churton* v. *Douglas*, 1 John. 104.

Goodwill,—survival of, on expiration of partnership, term,—

And, as regards goodwill generally, it is now well settled, that (in the absence of some express provision to the contrary) the vendor of it may set up a rival business (*m*),—but not so as to solicit or canvass the customers of the old business (*n*),—Which rule applies also, where (under a special provision in that behalf contained in the partnership articles) the goodwill belongs (on the expiration of the partnership) to either of the partners exclusively (*o*): Also, although, upon the death of a partner, where the partnership articles provide that the business shall be carried on by the surviving partner or partners, the estate of the deceased partner is not entitled to receive anything from the partnership in respect of the goodwill (*p*),—*Scil.*, specifically; still the goodwill is an asset of the partnership,—and is to be valued as such (*q*).

and upon death of partner.

Limited partnerships,—constitution of; also qualities of.

By the Limited Partnerships Act, 1907 (7 Edw. VII. c. 24), on and after the 1st January, 1908, any number of persons (not exceeding 10 for banks, or 20 for other trades) may enter into a "limited partnership,"—one or more of them (called the "*general partners*") being liable for all the partnership debts and liabilities in the way usual at present, and the others of them (called the "*limited partners*") being liable therefor to the extent only of their capital actually in the business (s. 4): But the partnership must (for this purpose) be registered (s. 5), with the registrar of companies (s. 15),—the divers specified particulars (ss. 8, 9) being sent to him; and he issues his certificate of the registration (s. 13): Also, a general partner may be converted into a limited partner, —the due advertisement of that alteration being first notified in the *Gazette* (s. 10): But a limited partner may not withdraw his capital, or any part thereof (s. 4, sub-s. 3); nor may he interfere in the management of the business (s. 6, sub-s. 1); but he may (with the consent of the general partners) assign his share (s. 6, sub-s. 5), —and the partnership will not be dissolved by that (s. 6,

(*m*) *Cruttwell* v. *Lye*, 17 Ves. 335.
(*n*) *Trego* v. *Hunt*, 1896, A. C. 7.
(*o*) *Jennings* v. *Jennings*, 1898, 1 Ch. 378.
(*p*) *Hunter* v. *Dowling*, 1895, 2 Ch. 223.
(*q*) *Hill* v. *Fearis*, 1905, 1 Ch. 466.

sub-s. 5),—nor by his death, lunacy, or bankruptcy (s. 6, sub-s. 2): And subject to the distinctions above specified, a limited partnership is like any other partnership (s. 7), —Excepting that it may be wound up, compulsorily, under the Companies Act, 1908 (*r*), and in accordance with the Limited Partnerships (Winding up) Rules, 1909 (*s*).

When a partner is not a partner,—save towards third persons?

Apart altogether from the Limited Partnerships Act, 1907, there may be a sort of limited partnership: For example, a father and son may trade as partners (so as to be liable as such to the outside world),—and yet *inter se* may not be partners at all, or entitled or liable as such (*t*).

(*r*) 8 Edw. VII. c. 69, s. 267.
(*s*) *In re Hughes & Co.*, 1911, 1 Ch. 342.
(*t*) *Radcliffe* v. *Rushworth*, 33 Beav. 484.

CHAPTER VII.

ACCOUNT.

Account, action of,—at law and in equity.

THE action of account lay at the common law, in the case of bailiffs, receivers, and the like (including guardians in socage (*a*)); and by the *law merchant*, the action also lay between merchant and merchant (*b*); and the jurisdiction in account at law and in equity is now co-extensive (*c*).

(1) Principal against agent,—subject to the Statute of Limitations.

(1) Equity entertained actions for an account, where there existed a fiduciary relation between the parties,—For example, in favour of a principal against his agent (*d*); and the agent was required to account also for all the secret profits he might have made,—the law of the Court having been inexorable in that particular (*e*): But an agent was entitled to plead the Statutes of Limitation in his defence (*f*),—*Scil.*, in the absence of any express trust (*g*). Equity would also decree an account against the infringer of a patent,—on the ground that the patentee might adopt the acts of the infringer as the acts of his agent,—and in such a suit, he was required to elect between an account and damages (*h*): And the same rules were applicable in the case of tort-feasors generally,—the injured party being free to *waive* the tort, and to proceed for the profits made (*i*), excepting where the tort was a public wrong (*k*). Also, the assignee of a patent might sue a licensee of his assignor for an account (*l*),—Because, generally, a bailor may have an account (against his bailee) of any moneys received by

(a) Patentee against infringer.

(b) Assignee against licensee.

(*a*) Co. Litt. 90 *b*; 3 & 4 Anne, c. 16.
(*b*) Co. Litt. 172 *a*; 11 Rep. 89.
(*c*) *How* v. *Earl Winterton*, 1896, 2 Ch. 626, at p. 639.
(*d*) *Beaumont* v. *Boultbee*, 3 Ves. 485.
(*e*) *Parker* v. *McKenna*, L. R. 10 Ch. App. 96.
(*f*) *Friend* v. *Young*, 1896, 2 Ch. 421.
(*g*) *Burdick* v. *Garrick*, L. R. 5 Ch. App. 233.
(*h*) *Neilson* v. *Betts*, L. R. 5 H. L. 1.
(*i*) *Leeds* (*Duke*) v. *Amhurst*, 2 Phil. 117.
(*k*) *Marsh* v. *Keating*, 2 Cl. & F. 250.
(*l*) *Bergmann* v. *M'Millan*, 17 Ch. Div. 423.

the bailee as damages for a tort done to the bailee's possession,—even where the tort is one, in respect of the commission of which the bailee would be in no way personally liable to the bailor (*m*).

(2) *Cestui que trust* against trustee.

(2) Equity also exercised the jurisdiction in account, as between *cestuis que trustent* and their trustees, and mortgagors and their mortgagees; and it was (and is) chiefly in these two last-mentioned relations that the accounts were (and are) taken in equity: And, as regards mortgagees, it is to be remembered, that the power of the mortgagee to sell implies a power in him to give the due receipts for the purchase-moneys (*n*),—accounting therefor to the mortgagor, excepting where the selling mortgagee has already (at the date of the sale) acquired the mortgaged property by adverse possession (*o*).

(2a) Mortgagor against mortgagee.

(3) Cases of mutual accounts between plaintiff and defendant.

(3) Equity also exercised the jurisdiction in account, where there were mutual accounts between the plaintiff and the defendant,—"*mutual accounts*" arising where each *of two parties had received and also paid on the other's account* (*p*). Also, any complication in the account would, in general, and independently of other circumstances (*q*), have given jurisdiction to equity,—Although, now, under the Judicature Acts and the Arbitration Act, 1889, matters of account of the most complicated character may be (and usually are) referred to and taken by an official or other referee.

(4) Account in case of waste, —incident to injunction.

(4) Equity also exercised the jurisdiction in account, where the matter to which the account was incident was wholly equitable,—for example, in the case of *equitable* waste; and it has been commonly stated, that (until the Judicature Acts) equity had no jurisdiction to direct an account of *legal* waste, excepting always where the account was incident to other equitable relief properly claimed in equity (*r*): But, after Lord Cairns' Act (21 & 22 Vict. c. 27), an account of damages (or of profits in

(*m*) *The Winkfield*, 1902, P. 42.
(*n*) *Balfour* v. *Welland*, 16 Ves. 151.
(*o*) *Johnson* v. *Mounsey*, 11 Ch. D. 284.
(*p*) *Phillips* v. *Phillips*, 9 Hare, 471.
(*q*) *O'Connor* v. *Spaight*, 1 Sch. & Lefr. 305.
(*r*) *Jesus College* v. *Bloom*, 3 Atk. 262.

lieu of damages) became an almost invariable incident to every injunction.

Chief defences to suit for an account: (1) Settled account.

It is ordinarily a good bar to the claim for an account, that the parties have already in writing stated and settled the account, and have struck the balance; but, if there has been (in such stated and settled account) any mistake accident or fraud,—whereby the balance is incorrect,—equity will not suffer the account to be conclusive upon the parties: Wherefore, equity will, in some cases, direct the whole account to be "*opened*,"—*i.e.*, taken *de novo;* and in other cases, will allow the account to stand, with liberty to the plaintiff to "*surcharge and falsify*" it: And here it is to be mentioned, that the effect of the liberty to surcharge and falsify is, to leave the account in full force as a stated and settled account, *except so far as it can be successfully impugned by the opposing party*,—the showing an omission for which credit ought to have been given being a surcharge, and the proving a purported payment to have been wrongly inserted being a falsification; and (as regards every item) the *onus probandi* is on the party surcharging and falsifying (*s*).

(2) Laches and acquiescence.

The Court is unwilling, after a long time has elapsed, to open a settled account,—except in cases of manifest fraud (*t*),—and except as between a trustee and his *cestui que trust* (including a solicitor and his client (*u*)): Also, a broker is (for this purpose) in a fiduciary relation to his client (*x*),—although a banker (*y*) or an assurance society (*z*) is not so.

(3) Bar of time.

The defence of time (purely and simply) is also a good defence, in general, to the action for an account,—the limit being six years (under the 21 Jac. I. c. 16, s. 3) as regards ordinary accounts (*a*), and being also six years (under the 19 & 20 Vict. c. 97, s. 9) as regards accounts between merchant and merchant (*b*).

(*s*) *Pitt* v. *Cholmondeley*, 2 Ves. Sr. 565.
(*t*) *Banner* v. *Berridge*, 18 Ch. Div. 254.
(*u*) *Cheese* v. *Keen*, 1908, 1 Ch. 245.
(*x*) *Ex parte Cooke*, 4 Ch. Div. 123.
(*y*) *Foley* v. *Hill*, 1 Phill. 405.
(*z*) *Webster* v. *British Empire Assurance Co.*, 14 Ch. Div. 169.
(*a*) *Friend* v. *Young*, 1897, 2 Ch. 421.
(*b*) *Friend* v. *Young*, *supra*.

Accounts, although not taken in literal accordance with the contract of the parties, may be settled accounts notwithstanding.

Accounts are often taken (*e.g.*, between partners) without any very strict compliance with the articles regulating the manner of taking the account; and the question then arises, how far the account (although not stated in a regular manner) is to be taken as a settled account,—and binding accordingly in the absence of fraud: And it appears, that the Court will hold the account (although irregularly taken) to be a settled account, if it appears that (under all the circumstances) the parties so intended, —For, being *sui juris*, they may validly agree to variations in the mode of taking the account (*c*).

Account,—at the suit of one tenant against his co-tenant.

When land is held by several owners as tenants in common, and one of them is receiving the profits in exclusion of the others (*d*),—or is alone (and exclusively) working the mines within or under the land (*e*),—The remedy of the other or others (in either of these two cases) is account and not trespass,—the remedy by *ejectment* not being, of course, available in the absence of any *ouster* of title: Nor would the remedy by *injunction* be proper in the general case,—although sometimes it might be proper enough: And it is to be here noticed, that the remedy by account (in these cases) was first given by the statute 4 & 5 Anne, c. 16, s. 27,—the plaintiff charging the defendant (the co-tenant) as his (the plaintiff's) bailiff, and waiving his tortious receipt of more than his due share (*f*).

Account,—as of a bailiff's possession.

Infant's real estate,—case of:

The adverse possessor of the real estate of an infant is also, in the general case (*g*),—but not invariably (*h*),—chargeable as a bailiff, and not as a trespasser or adverse possessor; and in the account against any such bailiff as aforesaid,—whether in the case of co-tenancies, or in the case of an infant's real estates,—all "*just allowances*" are made to the defendant (*i*).

(*c*) *Holgate* v. *Shutt*, 28 Ch. Div. 111.
(*d*) *Jacobs* v. *Seward*, L. R. 5 H. L. 464.
(*e*) *Job* v. *Potton*, L. R. 20 Eq. 84.
(*f*) *Sturton* v. *Richardson*, 13 Mee. & W. 17.
(*g*) *Hobbs* v. *Wade*, 36 Ch. D. 553.
(*h*) *Crowther* v. *Crowther*, 23 Beav. 305.
(*i*) *Kennedy* v. *De Trafford*, 1897, A. C. 180.

CHAPTER VIII.

SET-OFF; ALSO, APPROPRIATION OF PAYMENTS,— AND OF SECURITIES.

SECTION I. SET-OFF.

Set-off,—at law;

IT is in accordance with natural equity that two cross demands or mutual debts should be set off the one against the other, and that the difference only between the two should be valid (*a*); but the common law required that the mutual debts should (for this purpose) be mutual *connected* debts (*b*),—and otherwise the respective creditors were required to sue in independent actions; and the "Statutes of Set-off" (*c*), whereby the common law right of "set-off" was enlarged, were only applicable where there was a bankruptcy.

and in equity.

On the other hand, equity, by virtue of its general jurisdiction, and quite apart from the Statutes of Set-off, granted relief in the case of unconnected *mutual* debts *where there was an existing debt due to B. from A.*, AND B. had become indebted to A. *in the expectation that the new debt would be discharged out of (or by means of) the existing debt* (*d*),—a principle which appears to be applicable to a debt of which the defendant is the assignee merely, and was not the original creditor (*e*). Also, generally, debts which had had a *common origin* would, in equity, have been set off against each other (*f*).

But, even in equity, the mere existence of cross demands was not (of itself) sufficient to give the right of set-off (*g*),—unless the defendant showed some *equitable*

(*a*) *Green* v. *Farmer*, 4 Burr. 2220.
(*b*) *Dale* v. *Sollet*, 4 Burr. 2133; *George* v. *Clagett*, 7 T. R. 359.
(*c*) 4 Anne, c. 17; 2 Geo. II. c. 22; 8 Geo. II. c. 24.
(*d*) *Roxburghe* v. *Cox*, 17 Ch. Div. 520.
(*e*) *Bennett* v. *White*, 1900. 2 K. B. 643.
(*f*) *Newfoundland State* v. *Newfoundland R. C.*, 13 App. Ca. 199.
(*g*) *Rawson* v. *Samuel*, 1 Cr. & Ph. 161.

ground for being protected against the full demand: For example, the assignee of a chose in action taking subject to the equities properly incident to the debt, took subject to the right of set-off (*h*).

Set-off when and when not prevented by some intervening equity.

Wherefore also, in equity, a set-off was prevented by some intervening equity; and a shareholder (*e.g.*) in a limited company, who was also a creditor of the company, was not allowed (in a winding-up of the company) to set off his debt against a call, the equity of the general creditors preventing the set-off in such a case (*i*). But where the shareholder had for value assigned his debt, and the assignee (*k*) (being a particular assignee (*l*)) gave the company notice of the assignment,—There, *as against the assignee*, the company had not,—and even a prior debenture-holder of the company (*m*) had not,—a right to set off a call made *subsequently* to the notice (but only a call made *previously* thereto (*n*)). And an assignee of the debt would occasionally take free of the set-off altogether,—where (*e.g.*) the debt was negotiable (*o*). Also, the occupation rent with which a tenant in common in possession is chargeable,—and which (on a partition) will be set off against his share of the sale proceeds of the land,—cannot be so set off as against his mortgagee (*p*). But a solicitor's lien on costs will not, *now*, prevent the party liable to pay the costs from setting-off against them the amount of the debt recovered by him in the proceeding (*q*): And generally, damages may be set off against damages (*r*), and costs against costs notwithstanding the lien (*s*),—*Scil.*, where all the costs have been incurred in one and the same action or proceeding (*t*),—and not otherwise (*u*).

Solicitor's lien,—how affected?

(*h*) *Bankes* v. *Jarvis*, 1903, 1 K. B. 549.
(*i*) *Hiram Maxim Lamp case*, 1903, 1 Ch. 70.
(*k*) *Christie* v. *Taunton, &c. Co.*, 1893, 2 Ch. 175.
(*l*) *In re Brown and Gregory*, 1904, 1 Ch. 627.
(*m*) *Nelson* v. *Faber*, 1903, 2 K. B. 367.
(*n*) *Christie's case*, *supra*.
(*o*) *Farmer* v. *Goy & Co.*, 1900, 2 Ch. 149.
(*p*) *Hill* v. *Hickin*, 1897, 2 Ch. 579.
(*q*) *Pringle* v. *Gloag*, 10 Ch. D. 676.
(*r*) *Goodfellow* v. *Gray*, 1899, 2 Q. B. 498.
(*s*) *Farmer* v. *Goy & Co.*, 1900, 2 Ch. 149.
(*t*) *David* v. *Rees*, 1904, 2 K. B. 435.
(*u*) *Bake* v. *French*, 1907, 1 Ch. 428.

"Mutual dealings,"—in bankruptcy, &c.,—set-off by reason of.

In bankruptcy (*x*), if there have been "*mutual credits mutual debts or other mutual dealings*" between the bankrupt and any other person (proving in the bankruptcy), the sum due from the one party shall be set off against any sum due from the other (*y*); and this rule extends to unliquidated damages arising in connection with a *contract* (*z*); and the right is available also, in the administration of insolvent estates (*a*),—and in the winding-up of companies (*b*). But the difficulty in all these cases, is to show that the credits debts and dealings have been (in fact) mutual (*c*),—*semble*, mutual in their first creation (*d*).

No set-off, of debts accruing in different rights;

In the general case, a joint debt shall not be set off against a separate debt (or a separate debt against a joint debt): And, as regards debts accruing in different rights, the rule is, that they shall not be set off (*e*),—although, under exceptional circumstances, they may be set off: For example, a debt owing by A. *in son droit* will be set off against a debt owing to A. *in autre droit*, where A. (besides being executor) is also residuary legatee, and the debt owing to A. as executor has become (in effect) a debt owing to A. *in son droit* (*f*): Also, a debt owing to the administrator personally was set off against money with which the administrator as such was chargeable, the administrator being also residuary legatee, and the estate having been (in effect) "*cleared*" (*g*): And, lastly, where A. was a legatee, and A.'s husband was indebted to the testator, the executor was held entitled to retain the debt out of the legacy,—although A. might have asserted her equity to a settlement out of the legacy (*h*), —which equity has priority over the right of retainer (*i*).

(*x*) *Re G. E. B.*, 1903, 2 K. B. 340.
(*y*) *In re Mid-Kent Fruit Co.*, 1896, 1 Ch. 567.
(*z*) *Elliott* v. *Turquand*, 7 App. Ca. 79.
(*a*) *Sovereign Life Assurance* v. *Dodd*, 1892, 2 Q. B. 573.
(*b*) *Mersey Steel Co.* v. *Naylor*, 9 App. Ca. 434.
(*c*) *In re Gedney*, 1908, 1 Ch. 809; *Lord's Trustee's case*, 1908, 2 K. B. 54.
(*d*) *Bennett* v. *White*, 1910, W. N. 97.
(*e*) *Bishop* v. *Church*, 3 Atk. 691.
(*f*) *Bailey* v. *Finch*, L. R. 7 Q. B. 34.
(*g*) *Price* v. *Price*, 11 Ch. D. 163.
(*h*) *Poulter* v. *Shackel*, 39 Ch. D. 471.
(*i*) *Sloper* v. *Oliver*, L. R. 16 Eq. 481.

or where money is specifically appropriated;

Where money has been received for a specific purpose, it cannot, of course, be applied for any other purpose; and a solicitor (*e.g.*) may not apply such money in discharge of his costs (*k*),—even as regards any balance of the money which may remain over, after the specific purpose is answered (*l*); but (under exceptional circumstances) a set-off may be allowed in such a case (*m*).

or where debts are of intrinsically different qualities.

A set-off is only available where an action would lie (*n*); and therefore there can be no set-off of a non-actionable claim against an actionable debt (*o*), or of an ordinary executable debt against one that is exempt from recovery by execution (*p*), or of a debt which is statute-barred against a debt which is not statute-barred (*q*), or of money payable to A. B. on his (A. B.'s) death only against money due from A. B. in his (A. B.'s) lifetime (*r*). Nor may a legacy be set off against a mere *liability* incurred on behalf of the legatee (*s*),—except to the extent of any actual payment made (under legal compulsion) on account of the liability (*t*), and except to the extent of any actual appropriation for the legacy (*u*).

Legacy against debt,—usually set off.

Where a legatee is a *debtor*,—*Scil.*, a sole, and not a joint, debtor (*x*),—to the estate, he must, in general, first pay up what he owes (in respect of the debt), before he will receive anything (on account of his legacy (*y*)),—even although the debt should be statute-barred (*z*): *Secus*, if the legatee is not the debtor, but only the representative of the debtor (*a*). Also, where the legatee

(*k*) *Stumore* v. *Campbell & Co.*, 1892, 1 Q. B 344.
(*l*) *In re Mid-Kent Fruit Co.*, 1896, 1 Ch. 567.
(*m*) *Ex parte Stephens*, 11 Ves. 24.
(*n*) *Smith* v. *Betty*, 1903, 2 K. B. 317.
(*o*) *Rawley* v. *Rawley*, 1 Q. B. D. 460.
(*p*) *Gathercole* v. *Smith*, 17 Ch. Div. 1.
(*q*) *Walker* v. *Clements*, 15 Q. B. 1046.
(*r*) *Hall tt* v. *Hallett*, 13 Ch. D. 232.
(*s*) *Lee* v. *Binns*, 1896, 2 Ch. 584.
(*t*) *Adcock* v. *Evans*, 1896, 3 Ch. 345.
(*u*) *Edgar* v. *Plomley*, 1900, A. C. 431.
(*x*) *Turner* v. *Turner*, 1911, 1 Ch. 716.
(*y*) *Courtenay* v. *Williams*, 3 Ha. 539.
(*z*) *Coates* v. *Coates*, 33 Beav. 249.
(*a*) *In re Bruce*, 1908, 2 Ch. 682.

(A. B.) becomes a bankrupt *after* his right to the legacy has accrued, the testator's executors may retain out of the legacy the amount of A. B.'s debt,—unless they shall have proved for the debt in the bankruptcy (*b*). But, when the legatee (A. B.) is a bankrupt *already at the date of the death of the testator*, the executors may not retain, but can only prove and receive a dividend (on the debt) *pari passu* with the other creditors of A. B. (*c*); and, in such a case, if the insolvent legatee has meanwhile been released (by a composition in the bankruptcy), he is entitled to receive his legacy in full (*d*).

Where legatee-debtor is a bankrupt,—when and when not, legacy will be set off?

Section II. Appropriation of Payments.

If a debtor, who owes several debts to one and the same creditor, makes a general payment to him, the question arises,—To which of the debts shall the payment be appropriated (or imputed): For instance, if A. owes B. two distinct sums of £100 and £100, and the earlier of the two debts is statute-barred,—If A. pays £100 to B. and that payment is imputed to the earlier debt,—B. can still recover from A. (by action against A.) the other £100: Or if A. owes B. two sums of £500 and £500, and C. is a surety for one only of them,—If A. pays B. £500, and that payment is imputed to the £500 for which C. is a surety,—C.'s liability will cease (*e*). And having regard to the importance of these distinctions, the following rules, applicable to the appropriation of payments, have been made, that is to say:—

The three rules: (1) Debtor has first right to appropriate;

(1) The debtor has the first right to appropriate,—and he *exercises this option* at the time of making the payment (*f*);

(2) If the debtor himself has not appropriated the payment, the creditor is at liberty to appropriate it (*g*),—and he need not make an immediate appropriation, but

(2) The creditor has the next right of appropriation;

(*b*) *Re Rowe*, 1906, 1 Ch. 1.
(*c*) *Cherry* v. *Boultbee*, 4 My. & Cr. 442.
(*d*) *In re Sewell*, *White* v. *Sewell*, 1909, 1 Ch. 806.
(*e*) *Clayton's case*, 1 Mer. 572.
(*f*) *Anon.*, Cro. Eliz. 68; *Friend* v. *Young*, 1897, 2 Ch. 421.
(*g*) *Mutton* v. *Peat*, 1899, 2 Ch. 556.

may do so at any time before action (*h*),—or even, *semble*, in the course of the action (*i*);

(2a) The creditor may not appropriate the payment to an illegal item in the account (*k*); and where one of the two debts is statute-barred, and the creditor appropriates the payment to the statute-barred debt, that will not revive the statute-barred debt (*l*): And

(3) If neither debtor nor creditor makes the appropriation, the law makes it.

(3) Where neither the debtor nor the creditor has made any appropriation of the payment, the law appropriates it to the earlier of the two debts, according to what has been called the *Rule in Clayton's case* (*m*),—

Rule in *Clayton's case*,—when applicable?

Where it appeared, that, on the death of D. (a partner in the bank), there was a balance of £1,713 in favour of C. on his current account with the bank; and after the death of D., the surviving partners became bankrupt; but (before their bankruptcy) C. had drawn out sums to a larger amount than the £1,713, and had paid in sums still more considerable,—And the decision was, that the sums drawn out by C. *after the death of D.* were (*in relief of the estate of D.*) appropriated by the law to the payment of the balance of £1,713,—So that D.'s estate was discharged from the debt due from the firm at his death (the sums subsequently paid in by C. constituting a new debt, for which the surviving members of the firm alone were liable): And the decision proceeded on the ground, that (*presumably*) *the first item on the debit side of the account was discharged* (*or reduced*) *by the first item on the credit side*. The rule in *Clayton's case* is, however, only applicable when there is, in fact, a current account between the parties (*n*),—and is not always applicable even then (*o*): Thus, where the current account is guaranteed by a third party, and the guarantee ends (say) by the death of the guarantor, and a sum of £1,000 is then owing on the account,—the estate of the guarantor remains (in general) liable for that amount, notwithstanding that the principal debtor may have subsequently paid in other moneys,

And when inapplicable?

(*h*) *Smith* v. *Betty*, 1903, 2 K. B. 317.
(*i*) *Seymour* v. *Pickett*, 1905, 1 K. B. 715.
(*k*) *Wright* v. *Laing*, 3 B. & C. 165.
(*l*) *Mills* v. *Fowkes*, 5 Bing. N. C. 455.
(*m*) 1 Mer. 585.
(*n*) *Mutton* v. *Peat*, *supra*.
(*o*) *Cory Brothers* v. *Mecca S.S. Co.*, 1897, A. C. 286.

especially if these other moneys are carried to a *new account* (*p*). And, again, where the current account at the bank is made up partly of moneys belonging to the customer in his own right and partly of moneys belonging to him as a trustee for divers classes of *cestuis que trustent*,—paid in at different times indiscriminately, and drawn upon indiscriminately,—the rule (although it may apply as between the divers *cestuis que trustent* (*q*)) has no application as between the trustee and the *cestuis que trustent*,—the trustee not being permitted (*as against any cestui que trust*) to say, that what he has drawn out for his own purposes was not on account of his own fund (*r*). And, *nota bene*, even if the trust fund is not capable of being ear-marked, it may (*as against the trustee*) be followed,—upon the principle, that the *cestui que trust* is entitled (*as against his trustee*) to a *charge* upon the *whole* for the part belonging to the trust (*s*).

Section III. Appropriation of Securities.

The securities go in discharge,—(a) Whether one debt;

Where A. borrows money from B., and gives B. securities for the loan, A. is entitled (*to the extent of these securities*) to be indemnified by B. against personal payment of the loan; and (subject thereto) B. may (in general) deal with the securities, rendering to A. the surplus (if any) after payment of the loan; and B. may not (except by previous agreement with A.) so deal with the securities, as to deprive A. of the indemnity which is afforded him by the securities,—So that, *to the extent that B. disposes of the securities, the loan* (as between him and A.) *is discharged:* Also, where A. borrows from B. on successive loans, and gives successive securities to B. to provide for the payment of the loans, A. is deemed to have appropriated the successive securities to the successive loans; and the successive loans are successively discharged by the realisation of the successive securities respectively appropriated thereto.

or (b) Successive debts.

(*p*) *Rouse* v. *Bradford Bank*, 1894, 2 Ch. 32.
(*q*) *Wood* v. *Stenning*, 1895, 2 Ch. 433.
(*r*) *Ex parte Dale & Co.*, 11 Ch. Div. 772.
(*s*) *In re Oatway*, 1903, 2 Ch. 356.

Appropriation of "*short bills*" towards meeting "acceptances."

The practice of successive borrowings on successive securities is very usual among merchants,—For example, A. draws bills on B., and B. accepts the bills, on the faith of A. sending (and A., in due course, sends) to B. securities (*i.e.*, remittances) in the form of "*short bills*,"—the intention being that B. shall negotiate these short bills, and apply the proceeds in providing for his acceptances,—which application of the proceeds both discharges B. as acceptor and indemnifies A. as drawer: And (in such a case) if A. and B. should both of them go bankrupt (*t*) or become insolvent (*u*), while any of B.'s acceptances are outstanding, the short bills which then remain *in specie* (in the hands of B.) are properly applicable (according to their appropriation) in or towards providing against B.'s acceptances,—and so relieving both the estate of B. and the estate of A. The principle of the thing is the adjustment of the equities between the respective estates of A. and B.,—and the principle is extended in favour of any third parties who may, at the time of the double bankruptcy or insolvency, hold the acceptances of B.,—So that these holders also of B.'s acceptances (and who are called the bill holders) can insist on the short bills which remain *in specie* in B.'s hands being applied in or towards payment of the acceptances.

Only where both drawer and acceptor become bankrupt.

Where no double bankruptcy,—application of the "short bills."

But it is to be observed, that the rule in question (commonly called *the Rule in Ex parte Waring*) is only applicable, when A. and B. are both of them bankrupt (or insolvent): And therefore, Firstly, if B. alone is bankrupt (or insolvent), and A. is not (*x*),—the bill-holders prove against B.'s estate, on his liability as acceptor and get (say) 3s. 4d. in the pound, and thereafter obtain payment of the residue of their debt (16s. 8d. in the pound) from A. on his liability as drawer; And, Secondly, if A. is bankrupt and B. is not, B. discharges his acceptances in full and applies the short bills (as his own property) to the extent of what he has had to pay on his acceptances (*y*).

(*t*) *Ex parte Waring*, 19 Ves. 345.
(*u*) *Foules* v. *Hargreares*, 3 De G. M. & G. 430.
(*x*) *In re Boldero*, 19 Ves. 25.
(*y*) *In re Barned's Banking Co.*, L. R. 19 Eq. 1.

Where neither party is a bankrupt,—application of the "short bills" in such a case.

Also, generally, so long as both A. and B. are solvent, the bill-holders cannot interfere with what B. may choose to do with the securities,—even although appropriated,—the appropriation being only as between A. and B. (*z*); but (by special agreement with the bill-holders) the appropriation might (even in such a case) be extended in their favour (*a*),—the specific special appropriation being, of course, proved (*b*).

(*z*) *Banner* v. *Johnston*, L. R. 5 H. L. 157.
(*a*) *Agra and Musterman's Bank, Re*, L. R. 2 Ch. App. 391.
(*b*) *Brown Shipley & Co.* v. *Kough*, 29 Ch. Div. 848.

CHAPTER IX.

SPECIFIC PERFORMANCE.

Inadequacy of remedy at law, ground of equity jurisdiction.

By the common law, a contract to sell or transfer a thing was treated as a merely personal contract, and for the breach of which damages (and damages only) were recoverable; but, in equity, the due performance of the contract itself would (in many cases) have been enforced, —and that upon the ground of the inadequacy of the damages recoverable for the breach.

Contracts or agreements, which equity will not decree specific performance of:— (1) Illegal or immoral contracts.

Equity would not, of course, compel the specific performance of an agreement which was immoral (*a*), or contrary to the law of England (*b*); nor would damages even be recoverable in either of these two cases (*c*). But a separation agreement (where the separation is imminent and not merely prospective) is now considered neither illegal nor immoral (*d*),—and will be enforced (*e*): Also, a married woman may lawfully bind herself by a compromise in divorce proceedings (*f*): Also, her separation agreement will be enforced against her (*g*),—*Scil.*, unless where the husband (by his own wilful breaches of the covenants on his part contained in the agreement) has disentitled himself to that relief (*h*); but, if (and so far as) the separation agreement is (or becomes) illegal, it will not be enforced (*i*). But a covenant to resign a church living would not have been enforced (*k*).

(*a*) *Ewing* v. *Osbaldiston*, 2 My. & Cr. 53.
(*b*) *Hope* v. *Hope*, 8 De G. M. & G. 731.
(*c*) *Spicer* v. *Hunt*, 1908, 1 K. B. 720.
(*d*) *Webster* v. *Webster*, 4 De G. M. & G. 437.
(*e*) *Hart* v. *Hart*, 18 Ch. Div. 670.
(*f*) *Cahill* v. *Cahill*, 8 App. Ca. 420.
(*g*) *Besant* v. *Wood*, 12 Ch. Div. 605.
(*h*) *Kennedy* v. *Kennedy*, 1907, P. 49.
(*i*) *Cartwright* v. *Cartwright*, 3 De G. M. & G. 982.
(*k*) *Newdigate* v. *Helps*, 6 Madd. 133.

(2) Agreements without consideration, —or which are revocable or determinable.

Equity will not specifically enforce an agreement which is merely voluntary (*l*),—or which is determinable at will (*m*); But an agreement for a year to year tenancy will be enforced (*n*).

(3) Contracts which the Court cannot enforce.

(a) Contracts requiring personal skill, or continuous successive acts.

The incapacity of the Court will sometimes limit its jurisdiction to compel the specific performance of an agreement,—For example, where the agreement is to do acts involving personal skill (*o*), or is to do continuous successive acts (*p*),—although the Court will, in a proper case, decree the execution by the defendant of a covenant to do the acts, and the plaintiff will then from time to time recover damages from the defendant, for every successive breach by him of his covenant (*q*): Also, in the case of contracts to build or to repair, the remedy by specific performance is usually not needed, the remedy in damages being sufficient (*r*); but where the building agreement is definite in its nature, being (*e.g.*) for the construction of a railway siding (*s*), the Court will occasionally enforce it (*t*),—as where the plaintiff would otherwise be remediless (*u*), not being himself able, *without a trespass*, to execute the building contract otherwise than through the defendant (*x*).

(b) Contracts to build or repair.

(c) Non-severable contracts,— when only part thereof specifically performable.

In general also, where an agreement comprises two or more matters, only some of which are specifically enforceable, the Court will not enforce these latter, where they are dependent on the others (*y*). But where a building agreement provided that the lessor should grant leases, piecemeal, to the builder (or his assigns), upon the completion of the buildings on the several plots,—and the conditions

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(*l*) *Jefferys* v. *Jefferys*, Cr. & Ph. 141.
(*m*) *Hercy* v. *Birch*, 9 Ves. 357.
(*n*) *Lever* v. *Koffler*, 1901, 1 Ch. 543.
(*o*) *Lumley* v. *Wagner*, 1 De G. M. & G. 604.
(*p*) *Blackett* v. *Bates*, 2 H. & M. 270.
(*q*) *Wilson* v. *West Hartlepool R. C.*, 2 De G. J. & S. 475.
(*r*) *Ryan* v. *Mutual Tontine*, 1893, 1 Ch. 116.
(*s*) *Greene* v. *West Cheshire R. C.*, L. R. 13 Eq. 44.
(*t*) *Molyneux* v. *Richard*, 1906, 1 Ch. 34.
(*u*) *Wilson* v. *Furness R. C.*, L. R. 9 Eq. 28.
(*x*) *Fortescue* v. *Lostwithiel R. C.*, 1894, 3 Ch. 621.
(*y*) *Ogden* v. *Fossick*, 4 De G. F. & J. 426.

as to building on one plot had been fulfilled,—The Court enforced the agreement to grant a lease of that plot, notwithstanding that (as regards the other and unbuilt-on plots) the Court could not specifically enforce the agreement to build thereon (*z*). And, again, where some of the terms of an agreement are legal and the others are illegal, if these latter are clearly severable, the Court will (or sometimes will) enforce specifically the terms which are legal (*a*).

Contracts in restraint of trade,—modification and enforcement of.

As regards contracts in restraint of trade,—If the limits of the restraint are (in the opinion of the judge) unreasonable, the Court will (if it can) give the restraint a reasonable limit, and enforce it accordingly (*b*),—although, as a rule, if a contract is to be specifically enforced at all, the whole of it is to be enforced (*c*).

(4) Agreements for a reference.

As regards agreements for a reference,—Equity will not directly enforce (nor would a Court of law have directly enforced) an agreement to appoint an arbitrator (*d*),—although, indirectly (*i.e.*, by staying the action) the Court enforces such an agreement.

(5) Contracts for the loan of money.

Equity will not, in the general case, specifically enforce a contract for the loan of money, whether on mortgage or without any mortgage (*e*),—excepting that a contract to take the debentures of a company may now be enforced (*f*).

(6) Contracts wanting in mutuality.

Also, a contract, in order to have been specifically enforceable, must have been mutually binding,—and where the purchaser (of, *e.g.*, a patent) could enforce specific performance, the vendor on his side also would be able to enforce specific performance (*g*): And, conversely, if the purchaser could not, the vendor should not, specifically

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(*z*) *Wilkinson* v. *Clements*, L. R. 8 Ch. App. 96.
(*a*) *Odessa Tramways Co.* v. *Mendel*, 8 Ch. Div. 235.
(*b*) *Dubouski* v. *Goldstein*, 1896, 1 Q. B. 478.
(*c*) *Stocker* v. *Wedderburn*, 3 K. & J. 393.
(*d*) *In re Smith and Service*, 25 Q. B. D. 545.
(*e*) *Siehel* v. *Mosenthal*, 30 Beav. 371.
(*f*) 8 Edw. VII. c. 69, s. 105.
(*g*) *Cogent* v. *Gibson*, 33 Beav. 557.

enforce the contract (*h*),—Therefore, an infant cannot compel specific performance,—*Scil.*, because the Court will not compel specific performance against him (*i*); and, an infant's apprenticeship deed even is not enforced in equity (*k*),—because it is enforceable before the justices (*l*),—*Scil.*, during the infancy, and only during that (*m*). But a married woman might have obtained specific performance of her contract,—although the contract (being unacknowledged) was not, strictly speaking, binding on her (*n*); and the plaintiff (the vendor) might have had specific performance against a married woman purchaser (*o*). Also, a plaintiff may obtain specific performance of a contract signed by the defendant, although not signed by himself,—the Statute of Frauds only requiring the agreement to be signed by "*the party to be charged;*" and (in such a case) the plaintiff (by commencing the action) has made the remedy mutual: And note, that where a contract is by offer and acceptance, the offer in writing of the defendant may be accepted by word of mouth of the plaintiff (*p*),—or by telegram (*q*): And when the acceptance is by letter sent through the post-office, it is complete the moment the letter is posted; but the withdrawal of the acceptance, if also by letter, is not complete, until the letter of withdrawal is received (*r*). And here note, that when the offer is of two alternatives, the acceptance should specify which of the two alternatives is accepted (*s*).

(7) Contracts not in writing, when a writing is required.

Lastly, equity will not specifically enforce a contract (by the donee of a power) to appoint (by will) to any particular individual (*t*),—not even where the contract is

(8) Contract by donee of power, to make particular appointment.

(*h*) *Forrer* v. *Nash*, 35 Beav. 171.
(*i*) *Flight* v. *Bolland*. 4 Russ. 301.
(*k*) *De Francesco* v. *Barnum*, 45 Ch. Div. 430.
(*l*) *Green* v. *Thompson*, 1889, 2 Q. B. 1.
(*m*) *Gadd* v *Thompson*. 1911, 1 K. B. 364.
(*n*) Sugd. V. & P. 14th ed., p. 217, citing *Armiger* v. *Clarke*, Burr. 166.
(*o*) *Picard* v. *Hine*. L. R. 5 Ch. App. 274.
(*p*) *Lever* v. *Koffler*, 1901, 1 Ch. 543.
(*q*) *Godwin* v. *Francis*, L. R. 5 C. P. 295.
(*r*) *Henthorn* v. *Fraser*, 1892, 2 Ch. 27.
(*s*) *Lever* v. *Koffler*, *supra*.
(*t*) *Hill* v. *Schwarz*, 1892, 3 Ch. 510.

for value (*u*); but the party will be left to his remedy in damages for the breach, the damages being supposed to be sufficient.

Division of subject,—according as the property is realty or is personalty.

Where the Court decrees the specific performance of a contract, it proceeds not upon any mere distinction between land and goods, but simply upon the ground that the damages recoverable at law will not (in the particular case) afford a complete remedy,—So that, even in the case of goods, if the damages would be inadequate, the Court will enforce a contract regarding them:

I. Contracts respecting personal chattels,—specific performance of:—

(1) Shares in a railway company.

(2) Assigned debts under a bankruptcy.

Thus, specific performance will be decreed of an agreement for the sale and purchase of *shares* in a railway company (*x*); or for the sale and purchase of an annuity (*y*); or for the sale and purchase of debts provable in a bankruptcy,—and at the suit of either vendor (*z*) or purchaser (*a*),—*Scil.*, because the sale being of the uncertain dividends to become payable, the damages recoverable at law would not accurately represent their value. And the Court would also, and (especially since the 56 & 57 Vict. c. 71, s. 52) will, enforce a timber-purchase agreement (*b*),—and would, and will, issue an injunction in aid (*c*). Also, the Court would compel the specific delivery of articles of unusual beauty or rarity, on the ground that the damages are not an adequate compensation for their non-delivery (*d*),—or the specific delivery up of heirlooms, on the same ground (*e*). The Court will also decree the specific performance of marriage articles,—where the marriage has been solemnised on the faith thereof,—Even where a bond is given by way of collateral security for the due performance of the articles, the damages recoverable on the bond not being deemed an equivalent (*f*). Also, generally, where a fiduciary

(3) Rare and beautiful articles.

(4) Heirlooms and other chattels of peculiar value.

(5) Trust stocks,—and trust goods generally.

(*u*) *Zaiser* v. *Lawley*, 1902, 2 Ch. 799.
(*x*) *Duncuft* v. *Albrecht*, 12 Sim. 199.
(*y*) *Kenny* v. *Wenham*, 6 Madd. 355.
(*z*) *Adderley* v. *Dixon*, 1 S. & S. 607, 610.
(*a*) *Cogent* v. *Gibson*, 33 Beav. 557.
(*b*) *Buxton* v. *Lister*, 3 Atk. 385.
(*c*) *Jones* v. *Tankerville*, 1909, 2 Ch. 440.
(*d*) *Falcke* v. *Gray*, 4 Drew. 658.
(*e*) *Pusey* v. *Pusey*, 1 Vern. 273.
(*f*) *Hobson* v. *Trevor*, 2 P. Wms. 191.

relation subsisted between the parties,—whether it was that of agent trustee or broker,—the Court would compel a specific delivery up of the stocks cargoes or other chattels (*g*).

II. Contracts respecting land,—enforced, because damages at law no remedy.

Contracts regarding lands differ greatly from contracts respecting goods,—Because the land may have a peculiar value to the purchaser; and the Court therefore (almost invariably) decrees the specific performance of contracts regarding lands: And the jurisdiction extends to lands out of the jurisdiction, where the contracting parties are within the jurisdiction (*h*), and the action is against one of them personally (and not against his or her assignee of the contract (*i*)).

Specific performance,—the two senses in which the phrase is used.

The phrase "*specific performance*" is commonly used in two senses, that is to say: (1) In the sense of turning an executory contract (sometimes called "*Heads of Agreement*") into an executed contract,—by decreeing the execution of the document (usually a lease or conveyance), which (in and by the executory contract) is provided for; and (2) In the sense of carrying out, *in specie*, the very act or thing itself which is in the contract. Now, it is the former of these two meanings of the phrase, which is the more correct meaning,—*Scil.*, in cases where the Court decrees the specific performance of the contract, as distinguished from cases where the Court merely procures (in effect) the specific performance of it by means of an injunction: For example, the execution of the marriage settlement would be the specific performance of the marriage articles (*k*); and where the agreement was for a lease, the execution of the indenture of lease would be the specific performance of that agreement (*l*). And in the lease executed in specific performance of the agreement, all the agreed covenants, on the parts of the lessor and lessee respectively would be inserted,—the question, as to whether any of these covenants (while being *intended* covenants only) had been already

(*g*) *Wood* v. *Rowcliffe*, 2 Ph. 383.
(*h*) *Penn* v. *Lord Baltimore*, 1 Ves. 444.
(*i*) *Vincent* v. *Godson*, 4 De G. M. & G. 546.
(*k*) *Buckle* v. *Mitchell*, 18 Ves. 100.
(*l*) *Rankin* v. *Lay*, 2 De G. F. & J. 65.

broken, being afterwards raised in an action on the actual covenant itself (*m*); although, occasionally (as where the intended covenant has been already broken, and the breach of it is patent and also serious), the Court will merely refuse to specifically decree the lease (*n*).

Damages at law,—when nominal and when substantial.

The damages recoverable for the breach of a contract regarding lands, may be nominal only or may be substantial,—being nominal only, in respect of a breach which arises only from a defect of title (*o*); but being substantial, where the vendor is otherwise in default (*p*). Also, even in respect of a defect of title, if the contract was not merely (as it usually is) "*subject to an inquiry as to the title,*" but was with an actual "*warranty of the title,*" the damages recoverable for the breach would be substantial in that case also (*q*). On the other hand, the damages will sometimes be *nil* (*r*).

Contracts in writing,—ascertainment and enforcement of.

When the contract is required to be in writing, you may, for the purpose of ascertaining what the written contract is, read two or more documents (mutually completory) together, whether the documents connect *inter se* on the face of them, or their connection requires to be a little aided by extrinsic evidence (*s*); and parol (or extrinsic) evidence is, of course, always admissible, for the purpose of identifying the particular land comprised in the contract. But, *nota bene,* the mere presence of the writing will not of itself make a contract,—unless the parties were also intending a contract, when they signed the writing (*t*).

Where the sale is by auction.

When the sale is by auction, the auctioneer signing for the purchaser, after his implied authority to do so has ceased or been withdrawn, will not make a contract binding on the purchaser (*u*); and if the auctioneer (without any authority from the vendor to do so) alters, at the time

(*m*) *Lillie* v. *Legh*, 3 De G. & J. 204.
(*n*) *Gregory* v. *Wilson*, 9 Ha. 683.
(*o*) *Bain* v. *Fothergill*, L. R. 7 H. L. 158.
(*p*) *Engel* v. *Fitch*. L. R. 4 Q. B. 659.
(*q*) *Wall* v. *City of London R. P. Co.*, L. R. 9 Q. B. 249.
(*r*) *Pease* v. *Courtney*, 1904, 2 Ch. 503.
(*s*) *Pearce* v. *Gardner*, 1897, 1 Q. B. 688.
(*t*) *Pattle* v. *Hornibrook*, 1897, 1 Ch. 25.
(*u*) *Bell* v. *Balls*, 1897, 1 Ch. 663.

of the auction, the conditions of sale *as finally settled*, he will not make a contract binding on the vendor (*x*), —Because, generally, the auctioneer must confine himself within the limits of his authority, if he is to make a binding contract, and otherwise the contract will not be binding (*y*),—unless where the excess is immaterial.

Cases in which even the Statute of Frauds is broken in upon: (a) If unconscientious to rely on it,—generally.

Equity will (*occasionally*) decree specific performance of a contract which is not in writing, although required by the Statute of Frauds to be in writing: For although that statute says no action shall be maintained on an agreement relating to lands which is not in writing,—still the Court is in the daily habit of relieving, *where the party seeking relief has been put into a situation, which makes it generally* AGAINST CONSCIENCE *in the other party, to insist on the want of writing as a bar to the relief* (*z*),—and also *because the statute* (*having been made to prevent* FRAUD) *cannot be permitted to be used as the engine of fraud* (*a*): Therefore, equity would enforce specific performance of the contract, where it was fully set forth in the bill and confessed in the answer (*b*), the defendant being (in that case) deemed to have waived the writing (*c*); and if the objection was once waived, it could not afterwards (by amendment) be revived (*d*); and even if the wrong section only of the statute had been pleaded, the right section could not afterwards (by amendment) be pleaded (*e*). And, again, when the agreement was intended to have been put into writing, but (through a fraud in one of the parties) it was not put into writing, the want of writing was relieved against, if the contract was otherwise proper for specific performance (*f*): Also, where, upon a contract not in writing, the purchaser has paid a deposit on account of his purchase-money, and the vendor is ready and willing (up to the

(b) Where the agreement is confessed,—unless the defendant, notwithstanding, insists upon the defence of the statute.

(*x*) *Manser* v. *Back*, 6 Ha. 443.
(*y*) *Chinnock* v. *Ely*, 4 De G. J. & S. 638.
(*z*) *Bond* v. *Hopkins*, 1 Sch. & Lef. 433.
(*a*) *Davis* v. *Whitehead*, 1894, 2 Ch. 133.
(*b*) *Gunter* v. *Halsey*, Amb. 586.
(*c*) *James* v. *Smith*, 1891, 1 Ch. 384.
(*d*) *Spurrier* v. *Fitzgerald*, 6 Ves. 548.
(*e*) *James* v. *Smith*, *supra*.
(*f*) *Maxwell* v. *Montacute*, Prec. Ch. 526.

date of action) to complete, the deposit cannot be recovered back (*g*).

(c) Where the contract is partly performed by the party seeking aid.

Equity enforces specific performance also, where the parol agreement has been "*partly performed*" by the party praying relief,—Because, generally, where one party has carried out his part of the agreement (in the confidence that the other party will do the same), it is a fraud upon the former to suffer the latter to escape from the performance of the agreement (*h*): And, as regards *Part-Performance*:—Acts which are merely ancillary to the agreement,—delivering (*e.g.*) the abstract of title, going to view the estate, making valuations, and the like,—are not acts of part-performance (being acts for which damages are an adequate compensation (*i*)); and even the payment of the *whole* purchase-money (*k*), or (in the case of a weekly letting) of a *whole* week's rent in advance (*l*), is not an act of part-performance. Also, acts of alleged part-performance must be referable to the agreement; and otherwise they are not acts of part-performance (*m*),—So that (*e.g.*) mere possession of the land contracted for will not be deemed a part-performance, *if the possession be independent of the contract:* Thus, where a tenant in possession sued for the specific performance of an alleged agreement for a lease, and set up his possession as an act of part-performance, but his possession was referable to his pre-existing character of tenant, the possession was held not to be a part-performance (*n*). Also, if a tenant from year to year of a farm continues in possession, and lays out moneys on the farm in the usual and ordinary course of husbandry, that is not a part-performance which entitles him to the specific performance of an agreement for a lease (*o*).

Acts of part-performance, —what are not?

And what are?

But if the possession has been delivered *solely under and after the contract;* or if the possession (although

(*g*) *Thomas* v. *Brown*, 1 Q. B. D. 714.
(*h*) *Jervis* v. *Berridge*, L. R. 8 Ch. App. 351.
(*i*) *Williams* v. *Walker*, 9 Q. B. D. 576.
(*k*) *Hughes* v. *Morris*, 2 De G. M. & G. 349.
(*l*) *Thursby* v. *Eccles*, 70 L. J. Q. B. 91.
(*m*) *Lacon* v. *Mertins*, 3 Atk. 4.
(*n*) *Wills* v. *Stradling*, 3 Ves. 378.
(*o*) *Brennan* v. *Bolton*, 2 Dr. & War. 349.

delivered *before* the contract) is continued *subsequently* to the contract, AND *the continuance of the possession is referable unequivocally to the contract* (*p*); or if (in the case of an existing tenancy) the nature of the holding is made different from the original tenancy (as by the payment of a higher rent (*q*), or by any other unequivocal circumstance *referable solely and exclusively to the new contract* (*r*)),—In either or any of these cases, the possession will be an act of part-performance, and will take the case out of the statute, more especially where the party let into (or remaining in) possession has expended money on repairs or other improvements (*s*).

The doctrine of part-performance is not confined to land (*t*); but it is applicable exclusively to actions for specific performance (*u*): And, therefore, if the contract should have become impossible of specific performance, the acts of part-performance will cease to be available,—and the plaintiff will not (in such a case) have damages even (*x*).

Marriage, not in itself a part performance.

Marriage is not (of itself) an act of part-performance (*y*); but where a father (previous to the marriage of his daughter) told her intended husband, that he meant to give them (on their marriage) certain leasehold property (situate in Carey Street),—and after the marriage, *he gave up the possession of the property to the husband, and handed him the title-deeds,* that was a part-performance; and the property having been taken compulsorily by a public body, the compensation was payable to the husband, and not to the wife's father (*z*). It seems also, that if there be "a written engagement" after marriage, in pursuance of a parol agreement before marriage, that

(*p*) *Hodson* v. *Heuland*, 1896, 2 Ch. 428.
(*q*) *Miller* v. *Sharp*, 1899, 1 Ch. 622.
(*r*) *Dickinson* v. *Barrow*, 1904, 2 Ch. 339.
(*s*) *Gregory* v. *Mighell*, 18 Ves. 328.
(*t*) *McManus* v. *Cooke*, 35 Ch. D. 681.
(*u*) *Britain* v. *Rossiter*, 11 Q. B. D. 123.
(*x*) *Lavery* v. *Pursell*, 39 Ch. Div. 508.
(*y*) Dy. 296 *a* (Case 22); *Clinan* v. *Cooke*, 1 Sch. & Lef. 41.
(*z*) *Surcombe* v. *Pinniger*, 3 De G. M. & G. 571.

takes the case out of the statute,—the object of the 4th section of the Statute of Frauds not being to alter principles of law, but to prescribe a particular species or mode of *evidence* only (*a*).

A representation, for the purpose of influencing another, and which has that effect,—will be enforced.

Also, a representation made by one party (although by parol), for the purpose of influencing the conduct of another party and which is acted on by the latter, will be sufficient to entitle him to enforce the representation (*b*), —unless where the representation is merely of an *intention:* And, in fact, it is a leading principle of equity, that a third party who (upon the marriage of two persons) makes a representation (upon the faith of which the marriage takes place), shall make good his representation (*c*); and an injunction will be granted to restrain (*e.g.*) the enforcement of a demand, which the party seeking to enforce it, has (while the marriage treaty was pending) falsely represented to be non-existing (*d*); and although the party be an infant at the time, he (or she) will be bound by his (or her) misrepresentation in such a case (*e*).

Action for specific performance,—parties to.

Where there is a contract for the sale of land, and it is desired to have the contract specifically performed in equity, it is (properly speaking) only the parties to the contract who are to be made plaintiffs and defendants respectively in the action (*f*). Therefore, firstly, where the mortgagor has sold, the mortgagee is not a necessary party-defendant to the purchaser's action for specific performance (*g*); and, secondly, where the mortgagee has sold, the mortgagor is not a necessary party-defendant (*h*), —*Scil.*, where no relief (other than the specific performance only of the contract) is claimed. And similarly, when A. has sold to B., and then afterwards has sold to

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(*a*) *Gregg* v. *Holland*, 1902, 2 Ch. 360.
(*b*) *Farina* v. *Fickus*, 1900, 1 Ch. 331.
(*c*) *Bold* v. *Hutchinson*, 5 De G. M. & G. 558.
(*d*) *Nevill* v. *Wilkinson*, 1 Bro. C. C. 543.
(*e*) *Mills* v. *Fox*, 37 Ch. Div. 153.
(*f*) *Hill* v. *Gomme*, 5 My. & Cr. 250.
(*g*) *Tasker* v. *Small*, 5 My. & Cr. 63.
(*h*) *Corder* v. *Morgan*, 18 Ves. 344.

C., the action of B. (*Scil.*, for specific performance simply) is against A. only, and C. is not properly made a co-defendant with A. (*i*): Also, where an agent has sold in his own name (and without disclosing his principal's name), the purchaser properly sues the agent only (*k*),—any questions, that may be subsisting between the principal and the agent *inter se*, not concerning the purchaser in a mere specific performance action: Also, if A. agrees to grant a lease to B., and (before doing so) executes a mortgage to C. (who has notice of the agreement), the action by B. for specific performance of the agreement is (properly) against A. only, and not also against C. (*l*). And note, that where between the contract and the completion of the contract a bankruptcy intervenes, the bankrupt (vendor (*m*), or purchaser (*n*)) cannot, as a rule, have specific performance, but the trustee in the bankruptcy of either may (*semble*) have it upon terms (*o*); and the solvent purchaser may enforce against the bankruptcy trustee (of the vendor) the execution (*e.g.*) of the due conveyance (*p*),—the purchaser being, in such case, entitled also to set off any debt against the unpaid purchase-money (*q*).

Special defences to a suit for specific performance.

To an action for specific performance of a contract for the sale of lands, the want of writing to evidence the contract is, usually, a good defence,—unless and until it is displaced in one or other of the ways above indicated; and there are also the nine following other defences to such an action, that is to say:—

(1) Misrepresentation, by plaintiff, having reference to the contract.

(1) *Misrepresentation.*—This is a ground for refusing specific performance,—at the instance of the party who made the misrepresentation; and a misrepresentation, although it may only *in part* have induced the contract,

(*i*) *Cutts* v. *Thoday*, 1 Coll. 212.
(*k*) *Chadwick* v. *Maden*, 9 Ha. 188.
(*l*) *Long* v. *Benning*, 33 Beav. 585.
(*m*) *Lowes* v. *Lush*, 14 Ves. 546; *Ex parte Rabbidge*, 8 Ch. D. 367.
(*n*) *Franklin* v. *Brownlow*, 14 Ves. 550.
(*o*) *Worley* v. *Frampton*, 5 Ha. 560.
(*p*) *Pearce* v. *Bastable's Trustee*, 1901, 2 Ch. 122.
(*q*) *In re Taylor, Ex parte Norvell*, 1910, 1 K. B. 562.

will have the same effect (*r*); and the misrepresentation of an agent (acting within his authority), is the misrepresentation of his principal (*s*),—*Scil.*, where it is made for the principal's benefit only, and not otherwise (*t*).

In the case of a sale of leasehold lands, a representation that the lease contains no unusual covenants, will be a good ground of defence, if the lease contains in fact a covenant to build and to thereafter maintain buildings of a value to command double the rent reserved by the lease, or contains a covenant to erect only one house on the land (*u*), or any other like restrictive covenant; and the purchaser will be discharged from the contract, because (if he completed) he would be bound by the covenants in question, or (if not bound by them) would at any rate be harassed by their existence (*x*); Also, misleading conditions of sale (*y*) are, and (in the case of a sale by trustees) depreciatory conditions of sale used to be (*z*),—although these latter have now ceased to be (*a*),—a ground for refusing specific performance; but it is to be remembered, that a condition of sale is not necessarily misleading, merely because it excludes you from making certain requisitions on the title (*b*), there being certain requisitions which are often better left unmade.

(2) Mistake rendering specific performance a hardship. Remedy in case of: (1) Mutual mistake,—otherwise, "*Common mistake.*"

(2) *Mistake.*—Mistake also is a ground of defence,—*Non videntur, qui errant, consentire;* and parol evidence of the mistake is admissible: The mistake may either be the mistake of both the parties to the contract, or it may be the mistake of one only of them: And, firstly, when the mistake is the mutual or "*common*" mistake of both,—*and any particular hardship falls upon the purchaser,*—the mistake is a good ground for the purchaser being

(*r*) *Clermont* v. *Tasburgh*, 1 J. & W. 112.
(*s*) *Mullens* v. *Miller*, 22 Ch. Div. 194.
(*t*) *Lloyd* v. *Grace*, 1911, 2 K. B. 489.
(*u*) *Ilford Park* v. *Jacobs*, 1903, 2 Ch. 522.
(*x*) *Andrew* v. *Aitken*, 22 Ch. D. 218.
(*y*) *In re Sandbach and Edmondson's Contract*, 1891, 1 Ch. 99.
(*z*) *Dunn* v. *Flood*, 25 Ch. Div. 629.
(*a*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 14.
(*b*) *Blaiberg* v. *Keeves*, 1906, 2 Ch. 175.

(2) Unilateral mistake.

relieved from the contract (*c*). And even, secondly, where the mistake is of the defendant only, he will be (in effect) relieved from it,—because the plaintiff will not be able to enforce the specific performance of the contract against him (*d*), but will be left to his remedy for damages (*e*); and if it should happen, that (by reason of the mistake) there is a want even of the *assensus ad idem* which is required in every contract, there will be no right to damages even (*f*),—"*No contract, no damages.*"

Uncertainty (or indefiniteness),—when immaterial.

Where the contract is for a lease, any mistake or uncertainty, as to (*e.g.*) the date from which the term is to commence, will be fatal to the contract (*g*),—unless (upon the contract itself and the circumstances surrounding it) it is plain, that the term is to commence from the date of the possession given (*h*): But a trivial uncertainty, which can be removed by an enquiry, will not make the contract void, where (*e.g.*) the specific acreage leased (*i*), or the specific rent to be payable (*k*), is left indefinite but ascertainable: *Secus*, where the uncertainty is gross (*l*).

Effect of mistake, where a parol variation is set up as a defence:

(a) Where the error arose in the reduction of the agreement into writing.

Where the mistake is simply an error which has crept *into the writing*, and it appears that the written agreement (varied according to the defendant's contention) represents the true contract between the parties, the Court will enforce specific performance of the contract as so varied (*m*); but the plaintiff (on his part) cannot obtain specific performance of the written agreement with the variation (*n*),—unless the variation is merely some term omitted inadvertently out of the writing, and which is wholly in favour of the defendant, and the plaintiff consents to its inclusion (*o*). On the other hand, where the

(*c*) *Jones* v. *Clifford*, 3 Ch. D. 779.
(*d*) *Tamplin* v. *James*, 15 Ch. D. 215.
(*e*) *Van Praagh* v. *Everidge*, 1903, 1 Ch. 434.
(*f*) *May* v. *Thomson*, 20 Ch. D. 705.
(*g*) *Marshall* v. *Berridge*, 19 Ch. D. 233.
(*h*) *In re Lander and Bagley's Contract*, 1892, 3 Ch. 41.
(*i*) *Chattock* v. *Muller*, 8 Ch. D. 177.
(*k*) *Gregory* v. *Mighell*, 18 Ves 323.
(*l*) *Douglas* v. *Bayes*, 1908, A. C. 477.
(*m*) *Smith* v. *Wheatcroft*, 9 Ch. D. 223.
(*n*) *Townshend* v. *Stangroom*, 6 Ves. 328.
(*o*) *Martin* v. *Pycroft*, 2 De G. M. & G. 785.

(b) Where there is a misunderstanding as to terms of agreement.

(c) Where the parol variation adds a term *subsequent* to the contract.

mistake is a real misunderstanding, there will be a want of the necessary *assensus ad idem*,—and therefore no enforceable contract: And where the mistake (so called), which the plaintiff or defendant seeks to set up, is (in fact) a further term agreed to by parol between the parties *subsequently* to the written agreement, the contract (with such further term added to it) will not be enforced,—excepting, possibly, in a case where the refusal to enforce it might amount to a fraud (*p*), and excepting where there have been such acts of part-performance as would (in the absence of writing altogether) have justified a decree for specific performance (*q*). But no one will be allowed to call that a mistake which is merely an "*ambiguity*" in the writing; nor will either party be able to defeat the contract, by showing merely that *he* understood the writing as meaning something else (*r*),—unless, possibly, where the other party has induced the misunderstanding:

(3) Misdescription,—according as it is substantial or not.

Purchaser not compelled to take,—(a) Freehold instead of copyhold:

(3) *Misdescription*.—Firstly, Where the misdescription is *substantial*,—where the property (*e.g.*) is sold as copyhold, but turns out to be partly freehold,—the vendor cannot compel specific performance (*s*): But where the sale is of a defined acreage,—and the contract states that it is partly freehold and partly copyhold,—the sale would be free from objection (*t*); and on such a sale, if the timber on the *whole* of the lands sold was included in the sale and to be taken at a valuation,—that again would be no objection to the sale (*u*),—as neither would it be, where the whole of the land was copyhold (and no part of it was freehold(*x*)),—*Scil.*, because the timber is sold *as parcel of the land* (and with only the same title to it as to the land): Also, a purchaser will not be compelled to take an underlease instead of an original lease (*y*),—the differences between the two being differences not of value

(b) Nor an underlease instead of original lease.

(*p*) *Price* v. *Dyer*, 17 Ves. 364.
(*q*) *Van* v. *Corpe*, 3 My. & K. 269, 277.
(*r*) *Stewart* v. *Kennedy*, 15 App. Ca. 108.
(*s*) *Hart* v. *Swaine*, 7 Ch. Div. 42.
(*t*) *Monro* v. *Taylor*, 8 Ha. 51.
(*u*) *Crosse* v. *Lawrence*, 9 Ha. 462.
(*x*) *Crosse* v. *Keene*, 9 Ha. 469.
(*y*) *Madeley* v. *Booth*, 1 De G. & Sm. 718.

but of tenure (*z*): Also, where the property is subject to some statutory defeasance, the purchaser will not be held to his contract (*a*); and where a wharf and jetty were contracted to be sold, and it turned out, that the jetty was liable to be removed by the Corporation of London, specific performance was refused (*b*): Also, where, upon the sale of a residence and four acres of land, there was no title to a slip of ground (of about a quarter of an acre) between the house and the highroad, specific performance was refused (*c*),—Because, generally, where (owing to some defect in the property itself) the purchaser will not really get the property which he bought, specific performance will be refused (*d*),—as where (the purchase being of agricultural land) there is no right of cartway to it (*e*).

(c) A property which is not the property intended to be bought.

Secondly, Where the misdescription is *not substantial*, but is a proper subject for compensation, the Court will enforce the contract,—at the suit even of the vendor (he making compensation to the purchaser (*f*)): Therefore, where fourteen acres of land were sold as water-meadow, and twelve only answered that description, the misdescription was held to be matter for compensation (*g*). And it is to be mentioned, that, where the purchaser seeks specific performance, and there has been a misrepresentation as to the quantity, "*the right of the purchaser is to have what the vendor can give, with an* ABATEMENT *of the purchase-money* for so much as the quantity falls short of the representation" (*h*),—Or with such compensation (to be otherwise ascertained) as shall be proportionate to the defect (*i*): And where a vender (having only a partial estate) contracts to sell the whole fee simple, *if the purchaser chooses to take as much as he can have, he has a*

Where the difference is slight, and a proper subject for compensation, the contract will be enforced with compensation,—as where acreage is slightly deficient.

(*z*) *In re Beyfus and Masters' Contract*, 39 Ch. Div. 110.
(*a*) *Ballard* v. *Way*, 1 Mee. & W. 520.
(*b*) *Peers* v. *Lambert*, 7 Beav. 546.
(*c*) *Perkins* v. *Ede*, 16 Beav. 193.
(*d*) *Flight* v. *Booth*, 1 Bing. N. C. 370; and disting. *Shepherd* v. *Croft*, 1911, 1 Ch. 521.
(*e*) *Denne* v. *Light*, 8 De G. M. & G. 774.
(*f*) *Arnold* v. *Arnold*, 14 Ch. D. 270.
(*g*) *M'Queen* v. *Farquhar*, 11 Ves. 467.
(*h*) *Horrocks* v. *Rigby*, 9 Ch. Div. 180.
(*i*) *Hill* v. *Buckley*, 17 Ves. 394.

Partial performance not compelled, where unreasonable or prejudicial to third parties.

right to that and to an abatement (*k*),—Excepting that, where a partial performance of the contract (at the suit of the purchaser) would be unreasonable, or would be prejudicial to third parties interested in the property (*l*), the Court will refuse to enforce a partial performance of the contract: For example, where a husband and his wife contract to sell and convey the wife's fee simple lands (not being her separate estate), and the wife refuses to complete, there will not be even a partial performance (*m*),—*Secus*, where the husband is the alone vendor (*n*).

No compensation where there has been fraud;

nor where the compensation cannot be estimated.

The principle of granting compensation for a misdescription will not be applied, where there has been fraud or wilful misrepresentation on the purchaser's part (*o*),—or where the purchaser has otherwise (by his conduct) disentitled himself to that (*p*): Also, where there are no data from which the amount of the compensation can be ascertained (*q*), the Court cannot enforce the contract with compensation,—although that objection is one which the Courts are unwilling to entertain.

Compensation after completion.

After conveyance of the estate, in completion of the contract, a claim for compensation can be maintained (*r*), unless there is a condition expressly limiting the compensation to misdescriptions discovered before the date of the completion, and not afterwards: Which condition is a very just and proper condition, seeing that the compensation recoverable by the purchaser is often of very considerable amount (*s*), even where the misdescription hardly affects the real value of the property at all (*t*): And, *nota bene*, fiduciary vendors (*u*), and mortgagee-

(*k*) *Mortlock* v. *Buller*, 10 Ves. 315.
(*l*) *Thomas* v. *Dering*, 1 Keen, 729.
(*m*) *Castle* v. *Wilkinson*, L. R. 5 Ch. App. 534.
(*n*) *Barnes* v. *Wood*, L. R. 8 Eq. 424.
(*o*) *Price* v. *Macaulay*, 2 De G. M. & G. 339, 344.
(*p*) *In re Hare and O'More*, 1901, 1 Ch. 93.
(*q*) *Rudd* v. *Lascelles*, 1900, 1 Ch. 815.
(*r*) *Bos* v. *Helsham*, L. R. 2 Exch. 72.
(*s*) *Royal Bristol Society* v. *Bomash*, 35 Ch. Div. 390.
(*t*) *Cordingly* v. *Cheesebrough*, 4 De G. F. & J. 379.
(*u*) *Re Chifferiel*, 40 Ch. D. 45.

vendors (*x*), will be liable (in a proper case) to pay the due compensation for a misdescription,—and may also be without any right to be recouped the amount (*y*).

(4) Lapse of time,—when a bar in equity, and when not.

(4) *Lapse of Time.*—Time used always to be of the essence of the contract at law; but Courts of Equity discriminated between (1) those terms of a contract which were formal and (2) those which were of the substance and essence of the agreement,—and (where the element of time was clearly not of consequence) granted specific performance of agreements after the time for their performance had passed (*z*),—For example, where the purchaser for years had been in the enjoyment of the property, and what he wanted was merely the legal conveyance of it (*a*): However, even in equity, time was sometimes of the essence of the contract: As, firstly, where the time for the completion of the contract was from the beginning material, either by the express agreement of the parties (*b*), or from the nature of the subject-matter (as in the case of leasehold interests, reversionary interests (*c*), and colliery businesses (*d*)); and, secondly, where the time, although not originally of the essence of the contract, had (by subsequent notice) been made so,—the notice being reasonable and being given after the right to give it had accrued (*e*): Occasionally, also, the delay of the purchaser (in the completion of his contract) was so great, as to evidence an abandonment of the contract on his part (irrespectively of any express stipulation as to time (*f*)).

(5) Where the plaintiff has not "clean hands,"—but has been tricky or fraudulent.

(5) *Trickiness.*—Where the contract is tainted with fraud, the Court will refuse relief (*g*),—So that, if there has been any positive misrepresentation (*h*) or fraudulent

(*x*) *Tomlin* v. *Luce*, 43 Ch. D. 191.
(*y*) *Durham* v. *Legard*, 34 Beav. 611.
(*z*) *Parkin* v. *Thorold*, 16 Beav. 59.
(*a*) *Shepheard* v. *Walker*, L. R. 20 Eq. 659.
(*b*) *Honeyman* v. *Marryat*, 21 Beav. 24.
(*c*) *Walker* v. *Jeffreys*, 1 Hare, 341.
(*d*) *Macbryde* v. *Weekes*, 22 Beav. 533.
(*e*) *Green* v. *Sevin*, 13 Ch. D. 589.
(*f*) *Mills* v. *Haywood*, 6 Ch. Div. 196.
(*g*) *Post* v. *Marsh*, 16 Ch. Div. 395.
(*h*) *Higgins* v. *Samels*, 2 J. & H. 460.

suppression (*i*); or if there are misleading particulars or conditions (*k*), or (in the case of sales by trustees) depreciatory conditions (*l*),—In any of these cases, equity will refuse to enforce specific performance; and in any of these cases, the person defrauded may even rescind the contract (*m*); and the objection or requisition may be taken or made, *even when out of time* (*n*). But where a vendor has a merely personal objection to A.B. as a purchaser,—and will not sell to A.B. on any account; and C.D. purchases ostensibly for himself (and not for A.B.), but really for A.B.,—The vendor cannot, in respect of such "*personal*" trickiness, object (*semble*) to convey to A.B. (*o*),—unless, of course, the personal objection to A.B. is something more than personal (*p*): and as regards depreciatory conditions, a purchaser from trustee-vendors is not now concerned therewith, *after the completion of his purchase*,—unless (at the date of the contract of sale) he was acting in collusion with the trustees,—trustees themselves also not now being liable personally in any way, for alleged depreciatory conditions,—unless the conditions should, in fact, render the consideration for the sale inadequate; and while the sale still rests in contract only, a purchaser is now deprived of the right even of making requisitions on the ground of the conditions of sale being depreciatory (*q*).

Depreciatory conditions,—effect of.

(6) Great hardship in the contract.

(6) *Hardship*.—Although inadequacy in the price was not (except where the sale was of a reversionary interest (*r*)),—and is not (except where fraud enters into the contract (*s*)),—a ground for refusing specific performance,—Still a contract which would work a great hardship

(*i*) *Shirley* v. *Stratton*, 1 Bro. C. C. 440.
(*k*) *Brewer* v. *Brown*, 28 Ch. Div. 309; *In re Leyland and Taylor*, 1900, 2 Ch. 625; *In re Haedicke and Lipski*, 1901, 2 Ch. 666.
(*l*) *Rede* v. *Oakes*, 4 De G. J. & S. 513; *Dance* v. *Goldingham*, L. R. 8 Ch. App. 902; *Dunn* v. *Flood*, 25 Ch. D. 629.
(*m*) *Broad* v. *Munton*, 12 Ch. Div. 131.
(*n*) *In re Cox and Neve*, 1891, 2 Ch. 109.
(*o*) *Nash* v. *Dix*, 1898, W. N. 32.
(*p*) *Bonnett* v. *Sadler*, 14 Ves. 527.
(*q*) 56 & 57 Vict. c. 53, s. 14.
(*r*) *Perfect* v. *Lane*, 3 De G. F. & J. 369.
(*s*) *Sullivan* v. *Jacob*, 1 Moll. 477.

would not have been enforced (*t*),—*Scil.*, because the jurisdiction in specific performance is equitable and discretionary (*u*),—Excepting that, in the case of a railway company being the purchaser, the vendor is entitled (*as of right almost*) to specific performance (*x*). And where a mortgagee (who had foreclosed) sold inadvertently in purported exercise of his power of sale (thereby losing the benefit of his foreclosure), the Court declined to enforce the contract (*y*): Also, in the case of an award,—the leave to enforce which is almost a matter of course,—if there is great hardship in the award, its provisions will not be specifically enforced in equity (*z*).

And upon this defence of hardship, these two things ought to be here mentioned: Firstly, that the provisions of s. 5 of the Conveyancing Act, 1881 (for the compulsory discharge of incumbrances on a sale) are intended to operate only where the incumbrance may be conveniently discharged out of the purchase-moneys, and so as to still leave a fair amount of these moneys to come to the vendor (*a*),—That is to say, these provisions are not intended to operate, where they would entail some great hardship on the vendor (*b*); also, *nota bene*, these provisions do not secure an absolute protection from the charge (*c*); and, Secondly, that the defence of hardship in the contract is not an easy one to sustain, and there must be enough in it to induce the Court to refrain from enforcing the contract (*d*); and, more particularly, specific performance will not be refused, merely because (in the events which have happened *since* the contract was entered into) the completion of the contract will operate a hardship (*e*).

(7) *Illegality, &c.*—There will be no specific performance of an agreement which involves the breach of a prior

(7) The contract involves the breach of a prior con-

(*t*) *In re G. N. Ry. Co. and Sanderson*, 25 Ch. Div. 788.
(*u*) *Mortlock* v. *Buller*, 10 Ves. 291.
(*x*) *Eastern Counties R. C.* v. *Hawkes*, 5 H. L. Ca. 331.
(*y*) *Watson* v. *Marston*, 4 De G. M. & G. 230.
(*z*) *Nickels* v. *Hancock*, 7 De G. M. & G. 200.
(*a*) *In re Freme's Contract*, 1895, 2 Ch. 256.
(*b*) *In re G. N. Ry. Co.* v. *Sanderson*, *supra*.
(*c*) *In re Evans and Bettell's Contract*, 1910, 2 Ch. 438.
(*d*) *Pegler* v. *White*, 33 Beav. 403.
(*e*) *Adams* v. *Weare*, 1 Bro. C. C. 567.

tract, or a breach of trust.

contract (*f*), or a breach of trust (*g*); and an injunction even may be obtained, against the completion of such an agreement (*h*). But if the purchaser is told by the vendor, that the so-called prior contract, of which he (the purchaser) has notice, is not a contract at all, or not a valid contract, and the purchaser is prepared to take the risk,—he may complete, taking over the right of the vendor to upset the prior so-called contract (*i*); and if he would dispute such prior contract, he must, in fact, first complete his own contract in order to do so (*k*). Also, a contract which involves an illegality will not be specifically enforced,—as already mentioned on p. 474, *supra*.

Where there is an agreement for the purchase of land, and the purchaser assigns the benefit of the agreement (either by way of mortgage or by way of absolute assignment), the assignee ought to give the vendor notice of the assignment,—and ought also to do all that is necessary on his part in order to complete the purchase,—Because, if he fail to do that, the vendor may complete with the original purchaser, notwithstanding the notice (*l*),—or may compromise apart from the assignee altogether (*m*).

(8) The contract is not established, because some term wanting, or some condition precedent not fulfilled.

(8) *No Contract.*—If the alleged contract is no contract,—That is to say, if the contract is incomplete as a contract simply,—either from want of authority in either party to enter into it (*n*), or because it rests in negotiation merely (*o*); or (where the contract is by offer and acceptance) because the acceptance is not an absolute acceptance; or because the contract is subject to some condition precedent which has not been performed (*p*),—In any of these cases, the Court will not enforce specific performance of

(*f*) *Corbett's case*, 1905, 2 Ch. 280.
(*g*) *Sneesby* v. *Thorne*, 7 De G. M. & G. 399.
(*h*) *Manchester Ship Canal* v. *Manchester Racecourse*, 1900, 2 Ch. 352.
(*i*) *Goodwin* v. *Fielding*, 4 De G. M. & G. 90.
(*k*) *De Hoghton* v. *Money*, L. R. 2 Ch. App. 164.
(*l*) *Crabtree* v. *Poole*, L. R. 12 Eq. 13.
(*m*) *Ridout* v. *Fowler*, 1904, 2 Ch. 93.
(*n*) *Hawksley* v. *Outram*, 1892, 3 Ch. 359.
(*o*) *Hussey* v. *Horne-Payne*, 4 App. Ca. 311.
(*p*) *Coombe* v. *Wilkes*, 1891, 3 Ch. 77.

the contract: But, if the condition precedent is in favour of the plaintiff, and he waives it, then he may enforce the contract (*q*); and a contract is not the less a contract, because the parties have stipulated that a *formal* contract shall be drawn up (*r*),—unless the drawing up of the formal contract is made a condition precedent to the contract becoming effective as a contract (*s*). There must also, of course, be a sufficient certainty as regards the *parties* to the contract; but the vendor is sufficiently described, by being called "the proprietor" (*t*),—although not, if he is merely called "the vendor" (*u*); and an uncertainty as to the acreage (*x*), or even (in the case of an agreement for a lease) as to the rent (*y*), will not render the contract invalid, if the uncertainty can be removed on an enquiry.

Also, the contract may be made by an agent,—although without any authority or with an insufficient authority, at the time,—provided there be afterwards ratification by the principal (*z*), and provided the ratification come in due time (*a*): And when the price (either for the whole purchase or for any incidental part of the purchased premises) is to be ascertained by a valuation, the valuation is simply a valuation, and is not an arbitration (*b*); and where the incidental matter requiring to be ascertained by valuation, is (*e.g.*) the price to be paid for the fixtures, &c., that may be (*c*), but usually is not (*d*), of the essence of the contract.

While a contract is merely in consideration (*e*), or while any specific provision thereof is in proposal only (*f*),

(*q*) *Norris* v. *Jackson*, 1 J. & H. 319.
(*r*) *Filby* v. *Hounsell*, 1896, 2 Ch. 744.
(*s*) *Lloyd* v. *Nowell*, 1895, 2 Ch. 744.
(*t*) *Rossiter* v. *Miller*, 3 App. Ca. 1124.
(*u*) *Jarrett* v. *Hunter*, 34 Ch. Div. 182.
(*x*) *Chattock* v. *Muller*, 8 Ch. Div. 177.
(*y*) *Gregory* v. *Mighell*, 18 Ves. 323.
(*z*) *Dickinson* v. *Dodds*, 2 Ch. Div. 463.
(*a*) *Bell* v. *Balls*, 1897, 1 Ch. 663.
(*b* *In re Carus-Wilson and Greene*, 18 Q. B. D. 7.
(*c*) *Milnes* v. *Gery*, 14 Ves. 400.
(*d*) *Richardson* v. *Smith*, L. R. 5 Ch. App. 648.
(*e*) *Lucas* v. *James*, 7 Ha. 410.
(*f*) *Holland* v. *Eyre*, 2 S. & S. 194.

there is no complete contract between the parties but only negotiation; and either party may, therefore, withdraw from it.

(9) The vendor cannot make a title,—or can make only a doubtful title.

(9) *Title, Want of.*—If the contract relates to (or comprises) property to which the vendor is unable to make a title (*g*); or if the title which he purports to make out is too doubtful to be forced on a purchaser (*h*); or if the vendor's title to the property is dependent upon the performance by him of some condition precedent,—and he has not performed same (*i*), or has even incapacitated himself from performing it (*k*); or if the validity of the vendor's title depends upon proof of full value having been given on a previous purchase (*l*),—or upon proof of some previous purchaser having bought without notice (*m*),—In any of these cases, specific performance will be refused. But, as regards doubtful titles, if the Court should choose to decide that the title is good, that objection to the specific performance of the contract will be removed (*n*); but the Court will not so decide, in the face of any *dicta* of weight to the contrary (*o*); and the opinion of one of the conveyancing counsel, although it should be in favour of the title, will not remove the objection to it (*p*).

Title less than for forty years,—care relative to.

A purchaser of lands being now (by statute) entitled to a forty years' title,—and that even although recitals twenty years old are evidence,—any condition of sale (whereby the purchaser is restricted to a title less than forty years) must be fair and open (*q*),—That is to say, in order that the contract shall be specifically enforceable, the condition must give sufficient information regarding the root of title so selected, and also the reason for its selection (*r*).

(*g*) *Lawrie* v. *Lees*, 7 App. Ca. 19.
(*h*) *Pyrke* v. *Waddingham*, 10 Ha. 1.
(*i*) *Nicholson* v. *Smith*, 22 Ch. Div. 640.
(*k*) *Hipgrove* v. *Case*, 28 Ch. Div. 356.
(*l*) *In re Maskell and Goldfinch*, 1895, 2 Ch. 525.
(*m*) *In re Handman and Wilcox*, 1902, 1 Ch. 599.
(*n*) *Mullings* v. *Trinder*, L. R. 10 Eq. 449.
(*o*) *In re Thackwray and Young*, 40 Ch. D. 34.
(*p*) *Hamilton* v. *Buckmaster*, L. R. 3 Eq. 323.
(*q*) *In re Marsh and Granville*, 24 Ch. D. 11.
(*r*) *In re Hacdicke and Lipski*, 1901, 2 Ch. 666.

Title, when through a bankrupt,—when and when not good.

When the vendor makes title through an undischarged bankrupt,—or is himself an undischarged bankrupt,—and the property is *after-acquired* property,—It appears, that, if the trustee in the bankruptcy has not yet intervened to claim the property, a purchaser from the bankrupt may accept the title (if it is otherwise good) and safely complete where the property is of leasehold tenure (*s*), or is pure personal estate (*t*), or is a legacy or share of residue (*u*); but may not accept the title (or complete), where the property is of freehold tenure (*x*), or of copyhold tenure,—or is any estate or interest (whether legal or equitable) derived (by the bankrupt) out of any property of his own (whether freehold or copyhold (*y*)),—*Scil.*, unless the realty be partnership property,—which is, for this purpose, regarded as personalty (*z*).

Subsequent earnings of bankrupt,—his title to.

Generally, an undischarged bankrupt can give valid receipts for moneys earned by him (or otherwise coming to him) *subsequently*,—but may be ordered to pay over these moneys to the bankruptcy trustee (*a*); and the bankruptcy trustee may also follow these moneys into the hands of any *volunteer* receiving them,—but not into the hands of a payee thereof for value (even although the payee for value should have notice that the payer is an undischarged bankrupt (*b*)): Also, on the death of the bankrupt (still being undischarged), his legal personal representative may (*semble*) pay over and distribute his personal estate, to and among the beneficiaries entitled thereto (whether as legatees or as his next of kin),—Subject only to this, namely, that these beneficiaries may afterwards be called upon (by the bankruptcy trustee) to refund to him all these payments to them (*c*): And as regards (more particularly) the personal earnings of an undischarged bankrupt,—These are his to deal with (*Scil.*, until the bankruptcy trustee intervenes); and he may spend them (in a reasonable way) on himself and

(*s*) *In re Clayton and Barclay's Contract*, 1895, 2 Ch. 212.
(*t*) *Cohen* v. *Mitchell*, 25 Q. B. D. 262.
(*u*) *Hunt* v. *Fripp*, 1898, 1 Ch. 675
(*x*) *In re New Land Co. and Gray*, 1892, 2 Ch. 138.
(*y*) *Preston's Trustee* v. *Cooke*, 1906, 2 Ch. 661.
(*z*) *In re Kent County Gas Light Co.*, 1909, 2 Ch. 195.
(*a*) *Wadling* v. *Oliphant*, 1 Q. B. D. 145.
(*b*) *In re Behrend's Trust*, *Surman* v. *Biddell*, 1911, 1 Ch. 687.
(*c*) *In re Bennett*, *Ex parte O. R.*, 1907, 1 K. B. 149.

his family, and in payment of his business outgoings; but if and so far as the bankrupt does not so spend them (but saves them up and invests them), the bankruptcy trustee can claim the investments which represent them (*d*). However, as regards all the after-acquired property of an undischarged bankrupt (being property acquired by him in the course of his *subsequent* trading),—although the title of the bankruptcy trustee to that (when he intervenes to claim it) is good,—still his title is *subject to the subsequent trade-creditors being first satisfied their debts* out of such after-acquired property (*e*).

Rights of entry in bankrupt,—vesting of, in trustee.

Property which is the bankrupt's already at the date of his bankruptcy is, of course, not after-acquired property within any of the above rules (*f*); and where a bankrupt, at the date of the bankruptcy, was entitled already to certain freehold lands,—but had been dispossessed thereof, and had only a right of entry for the recovery of the possession, the right of entry was held to have vested in the bankruptcy trustee; and the bankrupt having sold and conveyed the lands to A.B. as the purchaser thereof, and A.B. having afterwards (by ejectment) recovered the possession of the lands from the adverse possessor thereof, the bankruptcy trustee was held to be entitled to recover over the possession from A.B., —That is to say, the right of entry in the bankruptcy trustee was paramount to the title which A.B. had acquired from the bankrupt (*g*).

Discharge, order for,—effect of.

Where a bankrupt has obtained his discharge, he is no longer an undischarged bankrupt, although his bankruptcy should not yet have been "*closed*,"—and he is therefore free to deal with his after-acquired property, and the bankruptcy trustee has no right to intervene as to that (*h*): Also, when a bankruptcy is annulled, all the bankrupt's property (which has meanwhile vested in the bankruptcy trustee) is, by order, re-vested in the bankrupt (*i*).

(*d*) *Ex parte Vine, In re Wilson*, 8 Ch. D. 364.
(*e*) *Troughton* v. *Gitley*, Amb. 629.
(*f*) *In re Calcot and Elvin*, 1898, 2 Ch. 460.
(*g*) *Jenkins* v. *Jones*, 9 Q. B. D. 128.
(*h*) *Ebbs* v. *Boulnois*, L. R. 10 Ch. App. 479; Bankruptcy Act, 1883, s. 44.
(*i*) *Pearce* v. *Bullard*, 1908, 1 Ch. 780.

"Good holding title."

Usually, the title which the purchaser may require, is only such a title as the conditions of sale entitle him to (*k*); and where the title depends (for its validity), upon proof that the seller had no notice himself of an incumbrance when he completed his own original purchase, the title is (or may be) a "good holding title,"—although it may be difficult for the purchaser to show, that the seller had in fact no notice at the time. Also, a restrictive covenant is like an incumbrance in that respect (*l*),—or is like an easement affecting the property,—and will therefore prevail, even against a purchaser buying without notice (*m*); but the legal estate will protect him (*n*): Also, anyone acquiring title by adverse possession acquires, in general, subject to the easements (if any) on the property (*o*).

"Marketable title,"—otherwise called a "Good title."

Usually, where a vendor contracts expressly to give a marketable title, that obliges him to get rid of any restrictive covenants or conditions which may affect the land, even although the purchaser may have known of them at the date of the contract and of the practical impossibility of obtaining any release of them (*p*). But where the contract is not express and absolute in that respect, and there are (to the purchaser's knowledge) restrictive covenants which are practically irremovable, the purchaser will be taken to have purchased subject thereto (*q*),—at least, in general (*r*): And where the defect is one of conveyance only and not of title, the purchaser, before he repudiates on that account, must give the vendor a reasonable opportunity of removing the defect (*s*). Also, upon the sale of a public-house with the licences attached thereto, it is sufficient, if the licences are valid at the date appointed for the conveyance in completion of the contract (*t*). Also, a purchaser is not entitled (nor is it wise

(*k*) *Hume* v. *Pocock*, L. R. 1 Ch. App. 379.
(*l*) *Cato* v. *Thompson*, 9 Q. B. D. 616.
(*m*) *Nottingham Co.* v. *Butler*, 18 Q. B. D. 778.
(*n*) *Wilkes* v. *Spooner*, 1911, 2 K. B. 473.
(*o*) *In re Nisbet and Potts*, 1906, 1 Ch. 386.
(*p*) *Cato* v. *Thompson*, *supra*.
(*q*) *Ellis* v. *Rogers*, 29 Ch. D. 661.
(*r*) *In re Gloag and Miller*, 23 Ch. D. 320.
(*s*) *Hatten* v. *Russell*, 38 Ch. D. 334.
(*t*) *Tadcaster Brewery Co.* v. *Wilson*, 1897, 1 Ch. 705.

of him) to make "*fanciful objections*" to the title,—requiring evidence, *e.g.*, on a sale of leaseholds, that the proviso for re-entry has not been enforced, where there is nothing to suggest any forfeiture on that account (*u*); but where any well-grounded suspicion arises on the abstract, he may legitimately enough require evidence to remove the suspicion (*x*).

Restrictive covenants,—obligation of; also repudiation on account of.

Where property is sold in lots to different purchasers,—whether at one sale or at successive sales, but according to one general "*building scheme*" (*y*),—In such a case, the intention (and, in fact, the contract) of the parties is, that each of the purchasers shall have the right of enforcing against the other purchasers the restrictive covenants and conditions comprised in the building scheme; and each purchaser may sue to enforce such covenants accordingly (*z*); and in the case of any unsold lots, the vendor himself is, and (until the sale thereof) remains, bound by these covenants, equally as the purchaser of them would be (*a*): Therefore, in such a case, where a subsequent purchaser from one of the original purchasers, contracts absolutely for the fee simple free from incumbrances, he may (on discovering the existence of the restrictive covenants) not only reject the title, but also rescind the contract (*b*), and recover back his deposit (*c*),—and he will not in such a case be liable in damages for breach of contract (*d*). But these rules are inapplicable to covenants which are purely personal and collateral,—and they are,—usually (*e*), but not invariably (*f*),—inapplicable to sales of pure personal estate (*g*). Also, they are inap-

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(*u*) *Moling* v. *Hill*, 1 Cox, 186.
(*x*) *In re Horne and Hellard*, 29 Ch. D. 736.
(*y*) *Reid* v. *Bickerstaff*, 1909, 2 Ch. 305, approving *Elliston* v. *Reacher*, 1908, 2 Ch. 374, 665.
(*z*) *Collins* v. *Castle*, 36 Ch. D. 243.
(*a*) *Re Allday's Contract*, 1893, 1 Ch. 342.
(*b*) *Wanton* v. *Coppard*, 1899, 1 Ch. 92.
(*c*) *In re White and Smith's Contract*, 1896, 1 Ch. 637.
(*d*) *Molyneux* v. *Hawtrey*, 1903, 2 K. B. 487.
(*e*) *Phillips* v. *Miller*, L. R. 10 C. P. 420.
(*f*) *McGruther's case*, 1904, 2 Ch. 306; *Menck's case*, 1911, A. C. 336.
(*g*) *Taddy's case*, 1904, 1 Ch. 354.

plicable, even as regards land, if there is no building scheme, in fact (*h*).

Street improvements,—liability for, and whether a charge or not.

As regards street improvements (and the liability to pay the proportion of expenses therefor apportioned to the purchased premises, or the charge for the apportioned part of these expenses),—These expenses are "*outgoings*," and the occupying tenant may (under his contract to pay and discharge all "*outgoings*") be liable to pay the charge, in exoneration of the vendor (*i*),—and incidentally, therefore, in exoneration of the purchaser also: But, usually, the tenant is not now liable, for (at least) the *whole* of these apportioned expenses; and so far as the occupying tenant does not pay them, these outgoings are (as between the vendor and the purchaser) a charge (in the nature of an incumbrance) on the property,—the charge taking effect, either (1) as from the time when there is a liability on some one to either execute the improvement (*k*), or to pay for it (*l*); or (2) as from *the date of the* COMPLETION *of the works* and before any final apportionment of the expenses (*m*): And under an "*open contract*," the charge falls, in general, on the vendor (*n*); and if the vendor was selling as tenant for life under the Settled Land Act, 1882, the charge would fall on the inheritance (*o*),—But, in either case, the purchaser must be relieved of the charge, although where the liability is a mere personal liability, a covenant of indemnity against it will, ordinarily, suffice (*p*).

Recoverable either (1) By summary proceeding; or (2) By action.

And note, that these outgoings in respect of street improvements, whether they amount or do not amount to a charge on the property, are summarily recoverable before the justices,—and within, in general, six months (*q*), and not afterwards; but where they amount to a charge on the property, they are also otherwise realisable out of

(*h*) *Reid* v. *Bickerstaff, supra; Wille* v. *St. John*, 1910, 1 Ch. 84, 325.
(*i*) *Wix* v. *Rutson*, 1899, 1 Q. B. 474.
(*k*) *Tubbs* v. *Wynne*, 1897, 1 Q. B. 74.
(*l*) *Aylett's case*, 1905, 2 K. B. 22.
(*m*) *In re Allen and Driscoll's Contract*, 1904, 2 Ch. 226.
(*n*) *In re Highett and Bird*, 1903, 1 Ch. 287.
(*o*) *In re Pazzi*, 1907, 1 Ch. 67.
(*p*) *Egg* v. *Blayney*, 21 Q. B. D. 107.
(*q*) *West* v. *Downman*, 14 Ch. D. 111.

the property,—just like ordinary charges and incumbrances are,—by action for a declaration of charge and for a sale to realise the charge (*r*).

Conditions excluding compensation for a deficiency of acreage,—construction of.

In contracts for the sale of land, it is not unusual to insert a condition, that the lots are believed to be correctly described as to acreage, and that no compensation shall be either paid or received for or in respect of any discrepancy in the acreage; and, in such a case, if a very considerable deficiency in the acreage is discovered before completion, the purchaser sometimes insists upon compensation for the deficiency, notwithstanding the condition,—and sometimes he claims to repudiate the contract, on the ground of the deficiency, alleging that the condition was intended to refer merely to slight discrepancies of acreage, and that otherwise it would cover even a defect of title and be an engine of fraud (*s*): Now, in cases of that sort, the purchaser cannot enforce specific performance with compensation, nor can the vendor do so without compensation (*t*); and in case the purchaser completes, he will not (after completion) be entitled to *compensation as for a defect of title* (*u*), his only remedy being to repudiate the contract before completion (*x*); and the vendor's remedy (if any) is to rescind (*y*).

Conveyance, when to be settled by the Court.

Where the Court decrees specific performance, it, usually, directs the conveyance (in execution of the contract) to be settled in chambers, in case the parties differ as to the same or as to any open clause therein; but any open clause, if sufficiently in issue on the pleadings, will be decided by the Court itself at the trial of the action (*z*). And, where the restrictive covenants and conditions affecting the property are not disclosed by the contract itself,—but only appear by the abstract of title which is subsequently delivered,—It is not right, in the general case, to refer to them at all in the conveyance (*a*),—a

(*r*) *West Ham* v. *Sharp*, 1907, 1 K. B. 445.
(*s*) *Jacobs* v. *Revell*, 1900, 2 Ch. 858.
(*t*) *In re Fawcett and Holmes's Contract*, 42 Ch. Div. 150.
(*u*) *Debenham* v. *Sawbridge*, 1901, 2 Ch. 98.
(*x*) *Jacobs* v. *Revell*, 1900, 2 Ch. 858.
(*y*) *Whittemore* v. *Whittemore*, L. R. 8 Eq. 603.
(*z*) *Hart* v. *Hart*, 18 Ch. Div. 670.
(*a*) *In re Monckton and Gilzean*, 27 Ch. D. 555.

rule which applies also to the liability of the property for the repair of (*e.g.*) a boundary wall (*b*); but the contract of sale may express, that the conveyance shall be made subject to the restrictive covenants and conditions (*c*). The vendor must, of course, deliver the due conveyance to the purchaser (*d*); and the purchaser may or may not be entitled to have a plan on his conveyance (*e*).

Possession not usually given, pending suit for specific performance.

Possession is not usually given pending a suit for specific performance; and the vendor (remaining in possession) is (to some extent) a trustee for the purchaser,—and must preserve the estate (*f*), and also re-let it, if need should be (*g*); but he is not liable for wilful default, like as a mortgagee (entering into the possession) would be (*h*). On the other hand, where the purchaser obtains possession before completion, and a suit for specific performance is afterwards commenced, he is, ordinarily, given the option, either to go out of possession or to pay the purchase-money (*i*),—or (as the case may be) the instalments of the purchase-money (*k*),—into Court; but he will not be allowed this option where he has (*e.g.*) diminished the value of the property, but will be required to pay the agreed purchase-money into Court (*l*).

Possession, where given,—on what terms given.

Possession may, of course, always be given before completion, upon terms (*m*); and a public company, by pursuing the terms in that behalf appointed by the Lands Clauses Act, 1845, may always obtain immediate possession; but if the company does not pursue those terms, *but contracts for the purchase in the ordinary way*, it will not be entitled (save upon agreed terms) to have the possession given to it pending the action for specific performance (*n*).

(*b*) *Hardman* v. *Child*, 28 Ch. D. 712.
(*c*) *Pollock* v. *Rabbits*, 21 Ch. D. 466.
(*d*) *Stone* v. *Smith*, 35 Ch. D. 188.
(*e*) *In re Sansom and Narbeth*. 1910, 1 Ch. 741.
(*f*) *Phillips* v. *Silvester*, L. R. 8 Ch. App. 173.
(*g*) *Royal Bristol* v. *Bomash*, 35 Ch. D. 390.
(*h*) *Bennett* v. *Stone*, 1903, 1 Ch. 509.
(*i*) *Greenwood* v. *Turner*, 1891, 2 Ch. 144.
(*k*) *Dixon* v. *Astley*, 19 Ves. 564.
(*l*) *Lewis* v. *James*, 32 Ch. Div. 326.
(*m*) *Cook* v. *Andrews*, 1897, 1 Ch. 266.
(*n*) *Bygrave* v. *Metropolitan Board of Works*, 32 Ch. Div. 147.

Interest on unpaid purchase-money,—liability for: (1) where possession taken;

Generally, the effect of taking possession before completion is, that (subject to anything to the contrary in the conditions of sale) the purchaser becomes liable for all the "*outgoings*" (if any); and (unless where there has been wilful default by the vendor) the purchaser must pay also interest on his purchase-money (remaining unpaid), even although the property should be producing less than the amount of the interest, or should be producing, in fact, no profit at all, and should even be "damnous" (*o*): And such taking of possession amounts also, in general, to an acceptance of the title,—at least, upon a sale by the Court (*p*),—That is to say, the taking of possession is evidence of the purchaser's acceptance of the title, although the evidence may be rebutted.

(2) Where possession not taken.

And, more particularly, as regards the purchaser's liability for the interest on his purchase-money remaining unpaid, he is, in general, liable to pay that, whether he has taken possession or not: Also, the interest is to be computed, as from the date fixed for the completion of the purchase,—and where no specific day is fixed, then as from the date at which he could first have safely taken possession (*q*). And these rules apply, although the property purchased should be reversionary (*r*),—or should be otherwise producing less than the amount of the interest, —and even although the exact amount of the purchase-money has not yet been ascertained (*s*),—purchase-money being (in this respect) different from compensation money (*t*). But an agreement to give possession by a specified day implying that a good title shall have been shown by that day (*u*),—Therefore, if the vendor is in default in that, he will disentitle himself to the interest which he would otherwise have been entitled to (*x*); and if the default of the vendor consists in his not having delivered the abstract of title on the day in that behalf

Effect, as to interest, where vendor is in default.

(*o*) *Ballard* v. *Strutt*, 15 Ch. D. 122; *Bennett* v. *Stone*, *supra*.
(*p*) *In re Gluag and Miller's Contract*, 23 Ch. D. 320.
(*q*) *Halkett* v. *Dudley* (*Earl*), 1907, 1 Ch. 590.
(*r*) *Ex parte Manning*, 2 P. Wms. 410.
(*s*) *Fletcher* v. *Lancashire*, *&c. R. C.*, 1902, 1 Ch. 901.
(*t*) *In re Richard and Great Western R. C.*, 1905, 1 K. B. 68.
(*u*) *Titley* v. *Thomas*, L. R. 3 Ch. App. 61.
(*x*) *Jones* v. *Gardiner*, 1902, 1 Ch. 191.

appointed, the purchaser will have an exactly corresponding extension of the time for completing (*y*).

Payment of purchase-money into a bank,—occasion for, and effect of.

Sometimes, in order to save the future interest on the unpaid purchase-money (and to reduce the liability of the purchaser for that), the purchaser pays the unpaid purchase-money into the bank, and gives the vendor notice of that payment, and claims thereafter to be liable for the interest only at the rate (if any) allowed by the bank, —Which claim (apart from any express provision for it in the contract) is worth only what it is worth (that is, nothing,—*Scil.*, if the vendor is not in default (*z*)). At other times, the unpaid purchase-money is (by consent of both vendor and purchaser) paid into and invested in their joint names, and upon the purchase being afterwards completed, the vendor takes the interim dividends which have accrued on the investment, and also (for better or worse) the capital of the investment,—for better, if the value thereof has meanwhile improved (*a*); and for worse, if the value thereof has meanwhile depreciated (*b*),—or (through the bank breaking) has been lost (*c*).

Title deeds,—delivery of, to purchaser on completion.

On completion of the purchase, the vendor must deliver up to the purchaser all the title deeds which relate exclusively to the purchased property (*d*),—or which (as between the vendor and the purchaser) become the property of the purchaser; and he must do so, even where the vendor is and remains liable to any previous purchasers for the production of these title deeds to them (*e*): But upon a sale in lots, the title deeds (when not retained by the vendor) are delivered over to the principal purchaser; and the other purchasers get (at the most) "*attested copies*" thereof, with an acknowledgment of their right to production.

Purchase, completion of, —with notice of deposit of title-deeds.

Where the title deeds of the vendor are with his bankers,—by way of security for his current account with

(*y*) *Sherwin* v. *Shakspear*, 5 De G. M. & G. 517.
(*z*) *In re B - W. & Co.*, 1909, 1 Ch. 648.
(*a*) *Burroughes* v. *Brown*, 9 Ha. 609.
(*b*) *Acland* v. *Gaisford*, 2 Madd. 28.
(*c*) *St. Paul* v. *Birmingham R. C.*, 11 Ha. 305.
(*d*) *Duthy* v. *Jesson*, 1898, 1 Ch. 419.
(*e*) *Williams* v. *Newcastle* (*Duchess*), 1897, 2 Ch. 144.

them,—and the purchase is on the point of completion, the purchaser may not (with safety) pay over his purchase-money to the vendor until the bank is first paid (or else settled with),—and if his purchase-money is payable by instalments, he may not pay over any instalment even; but if he have notified his purchase to the bank, he need not concern himself with any subsequent advances made by the bank to the vendor (*i.e.*, with advances made *subsequently to the notification of his purchase* (*f*)). The bank may, of course, be asked in such a case to release the purchased property,—and (for that purpose) to concur in the conveyance to the purchaser,—as where the purchase comprises only some small part of the premises comprised in the title deeds which are in mortgage by deposit with the bank:

Repudiation of contract by purchaser,—effect of.

The purchaser may repudiate the contract for sufficient cause (*g*); and even after a decree for specific performance, he may with the leave of the Court, repudiate (*h*),—and he may, in general, repudiate on any one or more of the nine grounds above particularised for resisting specific performance (*i*); but he must repudiate speedily, if he is to do it at all (*k*); and a defence which is sufficient for resisting performance, is not (in all cases) a sufficient ground of repudiation. In case the purchaser has had just and sufficient ground for his repudiation, he will be entitled to the return of his deposit (*l*); and if the sale was under the direction of the Court, he will get his costs and expenses also (*m*). But in case the purchaser should have repudiated without just and sufficient cause, he will be liable to the vendor in damages (*n*), and his deposit will be forfeited, whether the contract shall, or shall not, have expressly provided for such forfeiture (*o*); and a purchaser may also otherwise be disentitled to recover his

(*f*) *L. & C. Bank* v. *Ratcliffe*, 6 App. Ca. 722.
(*g*) *Brewer* v. *Brown*, 28 Ch. D. 309.
(*h*) *Halkett* v. *Dudley* (*Earl*), 1907, 1 Ch. 590.
(*i*) *Hope* v. *Walter*, 1900, 1 Ch. 257.
(*k*) *Halkett* v. *Dudley* (*Earl*), *supra*.
(*l*) *In re Terry and White's Contract*, 32 Ch. Div. 14.
(*m*) *Holliwell* v. *Seacombe*, 1906, 1 Ch. 426.
(*n*) *Noble* v. *Edwards*, 5 Ch. D. 378.
(*o*) *Howe* v. *Smith*, 27 Ch. D. 89.

deposit (*p*): And where there is a valid condition of sale, requiring the purchaser to assume something material to the title, and the matter required to be assumed is (in fact) untrue, these two things follow, namely,—The purchaser (on his part) is debarred from recovering his deposit (*q*); and the vendor (on his part) is debarred from specific performance (*r*).

Rescission of contract by vendor,—right of; also effect of.

As regards repudiation (otherwise rescission) by the vendor,—There is, usually, an express condition of sale in that behalf: Under which, *in case the purchaser takes any objection or makes any requisition which the vendor is either unable or unwilling to comply with,* the vendor has a right to rescind; and in a specific performance action by the vendor as plaintiff, if the defendant eventually fails to complete, the vendor becomes entitled to rescind (*s*). Also, generally, a vendor, if he have some title (*t*), and is acting honestly and not arbitrarily (*u*), is justified in inserting in the contract a condition giving him the right to rescind (*x*); and he may or may not make the exercise of the right dependent upon the purchaser's withdrawing or not the objection or requisition (*y*). But under a condition for rescission, the vendor may not "play fast and loose," holding his right of rescission in suspense, while negotiating with some third person for a re-sale (*z*); nor may he rescind after litigation accepted (*a*), or after judgment on a Vendor and Purchaser summons to be presently mentioned (*b*). Also, any mere dispute as to the form of the conveyance, is not a ground for rescission (*c*), unless the condition expressly gives the right in such a case (*d*),—but it would not, as a general rule, be

(*p*) *Ellis* v. *Goulton*, 1893, 1 Q. B. 350.
(*q*) *Best* v. *Hamond*, 12 Ch. D. 1.
(*r*) *Broad* v. *Munton*, 12 Ch. D. 131.
(*s*) *Olde* v. *Olde*, 1904, 1 Ch. 35.
(*t*) *Duddell* v. *Simpson*, L. R. 2 Ch. App. 102.
(*u*) *In re Weston and Thomas*, 1907, 1 Ch. 244.
(*x*) *In re Deighton and Harris*, 1898, 1 Ch. 458.
(*y*) *Ashburner* v. *Sewell*, 1891, 3 Ch. 405.
(*z*) *Smith* v. *Wallace*, 1895, 1 Ch. 385.
(*a*) *Isaacs* v. *Towell*, 1898, 2 Ch. 285.
(*b*) *In re Arbib and Class's Contract*, 1891, 1 Ch. 601.
(*c*) *In re Judd and Poland*, 1906, 1 Ch. 684.
(*d*) *In re Monckton and Gilzean*, 27 Ch. Div. 555.

proper to make the condition extend to that (*e*). Also, apart from any special condition entitling him to do so, the vendor cannot rescind for mere delay in payment of the instalments of the purchase-money (*f*),—unless the delay is evidence of a total abandonment of the contract (*g*).

Rescission, or compensation, —at suit of purchaser.

Usually, where the defect in the title is the existence of restrictive covenants and conditions, the purchaser's remedy is to rescind (*h*),—but he may sometimes (*i*), although not usually (*k*), have specific performance with an abatement of his purchase-money: Where the contract of sale contains,—and usually it contains,—both a rescission clause and a compensation clause, the vendor may (by a valid rescission) escape altogether from the compensation, the whole contract being determined by the rescission (if justified by the rescission-clause (*l*)).

Deposit, although forfeited,—to be allowed against the deficiency on a re-sale.

Where the vendor rescinds for the purchaser's default, and the condition under which he rescinds extends (as it usually does) to enabling the vendor to, in such a case, re-sell, and charge the defaulting purchaser with the deficiency on a re-sale, if a deposit has been paid by the purchaser, then (although the deposit is expressed to be forfeited) it must be allowed in computing the deficiency, where there is a deficiency, on the re-sale (*m*).

The Vendor and Purchaser Act, 1874, s. 9, —remedial jurisdiction under, and extent thereof.

By the Vendor and Purchaser Act, 1874 (*n*), s. 9, upon a sale of real or leasehold estate, the vendor or the purchaser (or their representatives) may apply (on summons in the Chancery Division),—Regarding any requisitions on (or objections to) the title; or regarding any claim to compensation; or, generally regarding any other question arising out of or connected with the contract,—not being

(*e*) *Hardman* v. *Child*, 28 Ch. Div. 712.
(*f*) *Cornwall* v. *Henson*, 1900, 2 Ch. 298.
(*g*) *Soper* v. *Arnold*, 37 Ch. D. 96.
(*h*) *Rudd* v. *Lascelles*, 1900, 1 Ch. 815.
(*i*) *Westmacott* v. *Robins*, 4 De G. F. & J. 390.
(*k*) *Ashburner* v. *Sewell*, *supra*.
(*l*) *Holliwell* v. *Seacombe*, 1906, 1 Ch. 426.
(*m*) *Shuttleworth* v. *Clews*, 1910, 1 Ch. 176, disapproving *Griffiths* v. *Vezey*, 1906, 1 Ch. 796.
(*n*) 37 & 38 Vict. c. 78.

a question affecting the existence (or *initial* validity) of the contract itself: And the judge may, on the hearing of the summons, make such order "as to him shall appear just,"—answering, of course, also the specific question or questions submitted by the summons (*o*); and the Court has power also to direct such things to be done as are the natural consequences of its decision on the summons: For example, when the Court decides, that the vendor has not shown a good title, it can go on and direct the vendor to return to the purchaser his deposit (*p*), with interest thereon (*q*), and to pay also the purchaser's costs of investigating the title (*r*).

Usually, also, the Court will expressly rescind the contract,—where the ground of objection is sustained on the hearing of the summons,—and it is a sufficient ground for rescinding: But, if damages *ultra* are claimed, the Court cannot give these also at the hearing of the summons,—but leaves the parties to pursue their legal remedy therefor (*s*),—Because, generally, on a vendor and purchaser's summons, the Court cannot award damages (properly so called), for misrepresenting (*e.g.*) that the drains and sanitary appliances were right (*t*). However, the decision of the Court, as to the title, is equally conclusive when given on the summons, as when given in an action commenced by writ (*u*).

(*o*) *In re Wallis and Barnard's Contract*, 1899, 2 Ch. 515.
(*p*) *In re Hargreaves and Thomson's Contract*, 32 Ch. Div. 454.
(*q*) *In re Riley and Streatfield's Contract*, 34 Ch. Div. 386.
(*r*) *In re Spindler and Mear*, 1901, 1 Ch. 908.
(*s*) *In re Scott and Alvarez's Contract*, 1895, 2 Ch. 603.
(*t*) *De Lassalle* v. *Guildford*, 1901, 2 K. B. 215.
(*u*) *In re Scott and Alvarez*, *supra*.

CHAPTER X.

INJUNCTION.

Injunction, nature of relief by.

An injunction, which used to be a writ issuing under an order of the Court, is now simply an order of the Court, issuing in the discretion of the Court (*a*),—whereby the Court restrains the commission of some wrongful act,—or its continuance,—or the continuance of some wrongful omission; and the order is, in general, preventive rather than restorative,—but may (in exceptional cases) be restorative (*a*): For example, if the wrongful act has been done in anticipation of the injunction (*b*), and after due warning (*c*), the injunction is restorative, otherwise *mandatory*,—to pull down (*e.g.*) and to spend money in doing so (*d*).

Two classes of injunctions, —prior to Judicature Acts.

Equity would have interfered by injunction either to prevent the inequitable institution (or continuance) of judicial proceedings, or to restrain wrongful acts *in pais;* but, under the Judicature Act, 1873 (*e*), s. 24, sub-s. 5, no cause or proceeding pending in the High Court of Justice, is now to be restrained by injunction (excepting in a winding-up proceeding, after order made); but every matter of equity (which would formerly have been ground for an injunction) may now be pleaded by way of defence to the action; and the Court (before which the action is pending) may also direct a stay of the proceedings in the action, or may make such other order as shall

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(*a*) *Hedley* v. *Webb*, 1901, 2 Ch. 126.
(*b*) *Van Joel* v. *Hornsey*. 1895, 2 Ch. 774.
(*c*) *Coles* v. *Sims*, 5 De G. M. & G. 1.
(*d*) *Powell* v. *Hemsley*, 1909, 1 Ch. 680.
(*e*) 36 & 37 Vict. c. 66.

appear to be just (*f*): Also, by the same Act, s. 25, subs. 8, an injunction may be granted,—or a receiver appointed,—and (if need be) both an injunction and a receiver (*g*),—by an interlocutory order of the Court,—in all cases in which it shall appear to the Court to be "*just or convenient*," that such order should be made,—against any threatened or apprehended waste or trespass, and irrespectively of the circumstance of the estates of the parties being legal or equitable (*h*), and whether the plaintiff or the defendant is in the possession (*i*). But the Judicature Acts have not given power to issue an injunction, in a case where (prior to the Acts) no Court had any jurisdiction in that behalf,—to restrain (*e.g.*) a party from proceeding with an arbitration *in a matter beyond the agreement to refer* (*k*); or to restrain a party from proceeding (without any authority whatever) in an arbitration in the name of another (*l*),—*Seil.*, because you may afterwards either plead the nullity of the award if you are made defendant to an action to enforce it (*m*), or you can (as plaintiff) obtain a declaration of such nullity (*n*).

Injunctions to the common law Courts.

It is to be remembered always, that a Court of Equity, where it granted an injunction against any proceeding in a Court of common law, *was restraining only the parties*,—and not the Court (*o*): For example, where an instrument had been obtained by fraud or undue influence, the Court would restrain the parties from bringing an action at law on it (*p*): or, if an executor or administrator had had sufficient assets to pay all the debts of the deceased, and by an accidental fire or by a robbery (*without any default on his part*) a great portion of the assets was afterwards destroyed or lost, the Court would restrain the creditors from proceeding at law against the

(1) Instrument obtained by fraud or undue influence.

(2) Loss of assets.

(*f*) *Norton* v. *Norton*, 1896, P. 36.
(*g*) *Lloyds Bank* v. *Medican Navigation*, 1905, 2 K. B. 359.
(*h*) *Jahn* v. *John*, 1898, 2 Ch. 573.
(*i*) *Talbot* v. *Howe-Scott*, 4 K. & J. 96.
(*k*) *North London R. C.* v. *Great Northern R. C.*, 11 Q. B. D. 30.
(*l*) *Farrar* v. *Closer*, 44 Ch. Div. 323.
(*m*) *Day* v. *Brownrigg*, 10 Ch. D. 294.
(*n*) *J. H. & Co.* v. *F.*, 1909, 2 K. B. 948.
(*o*) *Earl of Oxford's case*, 1 Ch. Rep. 1.
(*p*) *Tyler* v. *Yates*, L. R. 11 Eq. 265.

(3) Equitable title generally.

executor (*q*). Also, where a plaintiff at law had merely a legal title, and he was pursuing it to the detriment of the true beneficial owner, the Court would restrain him from such an abuse of his legal right,—For example, an inequitable ejectment would be restrained (*r*).

Injunction,—none, in general, to stay criminal proceedings; or where the ground of defence was equally available at law,—and had not been taken or maintained there.

But equity would not interfere to stay a libel action (*s*), —or, in general, to stay a criminal proceeding (*t*); and equity would not relieve against a judgment at law, where the ground of equity relied on was equally available at law, and had not been pleaded there by way of defence to the action (*u*).

Injunctions against wrongful acts *in pais*,—contracts and torts.

Injunctions to restrain wrongful acts *in pais*, may be either to enforce a contract, or to prevent a tort: And

(A) Injunction in cases of contract,—supplemental to the jurisdiction to compel specific performance.

Firstly, injunctions to enforce a *Contract*.—The jurisdiction of equity in injunction is co-extensive with its jurisdiction in specific performance; and, therefore, if the contract is not specifically enforceable by reason of *illegality*, the Court will not (by injunction) restrain the breach of it (*x*); and the Statute of Frauds may be successfully pleaded to the claim for an injunction, where the contract (being one which the statute requires to be in writing) is not in writing (*y*). But, in the absence of any objection of that kind, the remedy by injunction is, in general, available not only where the remedy by specific performance would be available, but also where the latter remedy would not be available: For example, in *Catt* v. *Tourle* (*z*), where the plaintiff (a brewer) sold a piece of land to the trustees of a freehold land society, —and the purchasers covenanted, that the vendor should have the exclusive right of supplying beer to any public-

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(*q*) *Job* v. *Job*, 6 Ch. Div. 562.
(*r*) *Coles* v. *Pilkington*, L. R. 19 Eq. 174.
(*s*) *Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. App. 142.
(*t*) *Saull* v. *Browne*, L. R. 10 Ch. App. 64.
(*u*) *Simpson* v. *Howden*, 3 My. & Cr. 108.
(*x*) *Davies* v. *Makuna*, 29 Ch. Div. 596.
(*y*) *Reeve* v. *Jennings*, 1910, 2 K. B. 522.
(*z*) L. R. 4 Ch. App. 654.

house to be erected on the land; and the defendant (who was also a brewer) acquired a portion of the land (*with notice of the covenant*),—and erected on it a public-house, which he supplied with his own beer,—The Court restrained him: And the like injunction would (under the like circumstances) be granted against the assignee (*a*) or lessee (*b*) of the covenantor, and against a mere occupier also of the premises (*c*),—Because, in the case of any one *deriving title under* the original covenantor, he is taken to know of (*i.e.*, he has constructive notice of) the restrictive covenant, and such notice binds the assignee lessee or occupier, equally with the covenantor himself (*d*): In other words, the purchaser of a lease containing restrictive covenants (or an intending sub-lessee deriving his term under the original lessee) may not have been compellable to complete the purchase (or sub-lease), because of the restrictive covenants (*e*); but having in fact completed, he is bound by the restrictive covenants, every restrictive covenant being on the land itself, and the burden of it *running* with the land (*f*).

Restrictive covenants,—notice of, effect of,—

before, and after completion of contract.

Restrictive covenants apply, of course, only to the land which is subjected thereto,—and therefore not to any other land (although adjoining thereto), acquired by the covenantor subsequently and by an independent title (*g*): Also, restrictive covenants may have been (and frequently are) released by (*e.g.*) a permanent alteration in the character of the neighbourhood (*h*); and from an open user of the premises (for, say, twenty-four years) contrary to the covenant, a release of the covenant will, usually, be presumed (*i*). However, the restrictive covenants may have been suspended only (*k*); but where the land (subject thereto) is acquired by public bodies under the provisions of the Lands Clauses Consolidation Act, 1845, the restrictive covenants are discharged altogether,

Restrictive covenants,—may have been discharged;

(*a*) *Tulk* v. *Moxhay*, 2 Phill. 774.
(*b*) *Holloway Brothers* v. *Hill*, 1902, 2 Ch. 612.
(*c*) *Mander* v. *Falcke*, 1891, 2 Ch. 554.
(*d*) *In re White and Smith's Contract*, 1896, 1 Ch. 627.
(*e*) *Supra*, p. 500.
(*f*) *Rogers* v. *Hosegood*, 1900, 2 Ch. 388.
(*g*) *Davies* v. *Town Properties*, 1903, 1 Ch. 797.
(*h*) *Bedford* v. *British Museum*, 2 My. & K. 552.
(*i*) *Hepworth* v. *Pickles*, 1900, 1 Ch. 108.
(*k*) *Tendring Union* v. *Dowton*, 1891, 3 Ch. 265.

or may never have attached.

—compensation being given for the injurious affection in such a case (*l*): And there are also cases in which the restrictive covenants may not (in the particular case) be applicable (*m*); and sometimes the owner has expressly reserved to himself the right of relaxing the restrictive conditions in particular instances (*n*); and sometimes the restrictive covenants are for his benefit alone (*o*); and if the original covenantee retains no land himself, the restrictive covenants would be personal,—and enforceable by the covenantee only (*p*): Also, the restrictive covenant of A. (the reversioner) expires with his reversion (*q*):

Injunction,—a mode of the specific performance of negative agreements;

It is evident, that where a contract capable of being enforced in equity is a negative contract, the most natural mode of its enforcement is by means of an injunction: Thus, where the contract was, that (in consideration of the plaintiffs having, at their own expense, erected a new cupola clock and bell to the parish church of Hammersmith) a certain bell which had been daily rung in the early morning *to the great annoyance of the plaintiffs (who were old ladies)*, should not be rung at that early hour during the lives of the plaintiffs and the life of the survivor of them, the agreement was specially enforced against the parish, by means of an injunction (*r*). Also, the negative covenant occurring in trade agreements,—to the effect (usually) that the covenantor will not trade within a defined district by himself or by his agent,—will be enforced by injunction, unless the conduct of the covenantee has disentitled him to that relief (*s*),—the district, if defined as being the area within so many miles of the market-place of A., being the area within a circle round the market-place of A. which has (for its radius) *a straight line* from (the centre of) the market-place (*t*).

Whether the negative covenant has been broken or not

(*l*) *Kirby* v. *Harrogate School Board*, 1896, 1 Ch. 437.
(*m*) *Tucker* v. *Vowles*, 1893, 1 Ch. 195.
(*n*) *Everett* v. *Remington*, 1892, 3 Ch. 148.
(*o*) *Renals* v. *Cowlishaw*, 11 Ch. Div. 866.
(*p*) *Formby* v. *Barker*, 1903, 2 Ch. 539.
(*q*) *Muller* v. *Trafford*, 1901, 1 Ch. 54.
(*r*) *Martin* v. *Nutkin*, 2 P. Wms. 266.
(*s*) *General Billposting* v. *Atkinson*, 1909, A. C. 118; *Measures, Limited* v. *Measures*, 1910, 2 Ch. 248.
(*t*) *Mouflet* v. *Cole*, L. R. 7 Exch. 70.

is always a question of fact,—And where, *e.g.*, the covenant is that of a young solicitor not to (in effect) practise in competition with (*i.e.*, within the defined area of the old practice of) the solicitor to whom he had been articled, or by whom (after his articles) he had been employed, the acts complained of will be judged by the words of the covenant,—and (as so judged) may (*u*) or may not (*x*) be a breach of the covenant.

And available, sometimes, even where contract not specifically enforceable.

The inability of the Court to compel the specific performance of the whole of an agreement, is not a ground for refusing to grant an injunction against the breach of the negative part of it; and, therefore, where a singer agreed with the plaintiff to sing for him at a specified theatre during a certain period of time, *and not during that period to sing elsewhere*, without his written authority, the Court restrained her from singing at a rival theatre,—the judge observing, that to the affirmative agreement of the defendant there was superadded a negative one; and he could compel the defendant to abstain from a breach of her negative agreement,—and possibly (in that way) cause her to fulfil her positive agreement (*y*).

No injunction where Court cannot secure performance by the plaintiff; or where the negative element in covenant is not apparent.

Also, generally, whether the negative agreement is merely ancillary to the affirmative one (*z*), or is co-extensive with it (*a*), the Court will enforce it (by injunction); and the contract, although affirmative in form, may be really negative in substance (*b*). But, where the negative covenant cannot be performed, *save conditionally on the affirmative one being first performed*, and the Court cannot enforce the affirmative covenant, it refuses to enforce the negative one either (*c*): And, generally, where the Court might (in the case of an *express* negative covenant) be competent to enforce the contract *in specie* (*d*), it will

(*u*) *Edmundson* v. *Reader*, 1905, 2 Ch. 320.
(*x*) *Woodbridge* v. *Bellamy*, 1911, 1 Ch. 326.
(*y*) *Lumley* v. *Wagner*, 1 De G. M. & G. 615.
(*z*) *Rickett* v. *Enfield Churchwardens*, 1909, 1 Ch. 544.
(*a*) *Grimston* v. *Cunningham*, 1894, 1 Q. B. 125.
(*b*) *National Provincial Bank* v. *Marshall*, 40 Ch. D. 112.
(*c*) *Hills* v. *Croll*, 2 Phill 60.
(*d*) *Hobson* v. *Tulloch*, 1898, 1 Ch. 424.

not *imply* such a negative covenant in what is simply an affirmative one (*e*),—merely for the purpose of enjoining a breach of it (*f*): Also, the Court will not restrain an infant (*Scil.*, during his infancy) from breaking his negative contract (*g*),—unless where contained in a contract for necessaries (*h*), or in an apprenticeship contract (*i*); and a wife will not be restrained on her husband's contract (*k*); nor an agent on his principal's contract (*l*).

Injunction, although the contract is *implied* only.

If a representation is made inducing another to do an act, equity restrains the contrary.

In the case of *implied* contracts also,—where these are of a negative character,—the Court will interpose (*m*): And it is, in fact, a very old head of equity, that, if a person makes a representation to another and the latter acts upon the faith of that representation, the former shall make good his representation, if it admits of being made good,—an injunction being the usual mode of indirectly enforcing the representation (*n*): And such a representation, where implied, may arise (*e.g.*) from the production of a sale-plan (*o*), or estate development plan (*p*), at an auction-sale. And, upon similar principles, where a person claiming a title in himself is privy to the fact that another is dealing with the property as his own, he will (although he may derive no benefit himself from the transaction) be restrained from asserting his own title against a title created by such other person (*q*); and where a person having the true title to an estate stands by, and suffers a person ignorant of that title to expend money upon the estate, the person who has so expended the money will (on eviction) be indemnified his expenditure (*r*). However, any mere *negligence* on the part of the true

(*e*) *Holford* v. *Acton Council*, 1898, 2 Ch. 240.
(*f*) *Whitwood Chemical Co.* v. *Hardman*, 1891, 2 Ch. 416.
(*g*) *De Francesco* v. *Barnum*, 43 Ch. Div. 165.
(*h*) *Evans* v. *Ware*, 1892, 3 Ch. 502.
(*i*) *Gadd* v. *Thompson*, 1911, 1 K. B. 364.
(*k*) *Smith* v. *Hancock*, 1894, 2 Ch. 377.
(*l*) *Gophir Co.* v. *Wood*, 1902, 1 Ch. 950.
(*m*) *Merryweather* v. *Moore*, 1892, 2 Ch. 518.
(*n*) *Piggott* v. *Straton*, 1 De G. F. & J. 33.
(*o*) *Peacock* v. *Penson*, 11 Beav. 355.
(*p*) *Squire* v. *Campbell*, 1 My. & Cr. 459.
(*q*) *Jones* v. *Carter*, 15 Mee. & W. 718.
(*r*) *Neesom* v. *Clarkson*, 4 Hare, 97.

owner, unless it amounts to an estoppel (*s*), will not have that effect (*t*): But where the maker of certain promissory notes paid them, and left them with the payee,—and the payee (fraudulently) negotiated them—The Court said, that, for such negligence as that, the maker was bound to pay the notes over again to a *bonâ fide* holder of them for value (*u*).

Statutory contracts,—breach of, restrained by injunction, without proof of actual damage.

The Court will also interpose by injunction to stay the breach of a statutory contract,—as where a railway company (*x*) (or, in fact, any other public company or body (*y*)), is exceeding or threatening to exceed its statutory powers,—or is using these powers vexatiously and oppressively (*z*), or colourably (*a*)—or is neglecting to observe the preliminary proceedings which are a condition precedent to its right to exercise these powers at all (*b*): And (in such a case) the Attorney-General may be the applicant for the injunction,—and need not show actual positive damage, but only a tendency to produce serious public mischief (*c*), or some illegality (*d*): But, *nota bene*, where the suit is for equitable relief, even the Attorney-General must not have been guilty of laches,—at least, as a general rule (*e*). Also, a shareholder in the company (suing as plaintiff) need not show any damage at all.—*Scil.*, Because an injunction will always issue (the case being otherwise proper) to restrain the breach of any *contract* (whether statutory or not), without proof of damage, *where the applicant is one of the contracting parties* (*f*); and an injunction will also issue (at the suit of such a shareholder), to restrain the directors of the company from abusing their legal powers (*g*).

(*s*) *Oliver* v. *Hinton*, 1899, 2 Ch. 264.
(*t*) *Canada Bank* v. *Bank of Hamilton*, 1903, A. C. 49.
(*u*) *Nash* v. *De Freville*, 1900, 2 Q. B. 72.
(*x*) *Farmer* v. *Waterloo and City R. C.*, 1895, 1 Ch. 527.
(*y*) *Att.-Gen.* v. *Hanwell U. D. C.*, 1900, 1 Ch. 511. and 2 Ch. 377.
(*z*) *Att.-Gen.* v. *Metropolitan Electric Supply*, 1905, 1 Ch. 757.
(*a*) *City of Westminster case*, 1905, A. C. 426.
(*b*) *Att.-Gen.* v. *Shrewsbury Bridge Co.*, 21 Ch. Div. 752.
(*c*) *Att.-Gen.* v. *Great Eastern R. C.*, 11 Ch. Div. 449.
(*d*) *Att.-Gen.* v. *Pontypridd U. D. C.*, 1906, 2 Ch. 297.
(*e*) *Att.-Gen.* v. *Grand Junction Canal*, 1909, 2 Ch. 505.
(*f*) *Davies* v. *Gas Light and Coke Co.*, 1909, 1 Ch. 248.
(*g*) *Att.-Gen.* v. *Mersey R. C.*, 1907, 1 Ch. 81.

(B) Injunctions against torts.

Secondly, injunctions to prevent a *Tort*.—As a general rule, wherever a right cognisable at law exists, a violation of that right will be prohibited by injunction,—excepting always where considerations of expediency prevent the Court from granting the injunction (*h*): And

(1) Waste,—kinds of, which are remediable in equity.

Firstly, *In the case of Waste*,—The Court will in general interfere, whether the titles of the parties are legal or are equitable and although the waste is apprehended only: Also, if there is a tenant for life, remainder for life, remainder in fee, and the tenant for life in possession is committing waste, the Court will interfere,—either at the suit of the remainderman for life (although he has not the *inheritance*) or at the suit of the remainderman in fee (notwithstanding the *interposed* life-estate (*i*)): Also, where a tenant for life without impeachment of waste, is guilty of that sort of capricious waste which is called "*equitable waste*,"—such as dismantling the mansion-house (*k*), or felling timber planted for the ornament and shelter of the mansion-house and grounds (*l*), —the Court will restrain him: And the same rule applies also to a tenant in tail after possibility of issue extinct, such a tenant having the same legal right (neither more nor less) to commit waste, that a tenant for life without impeachment of waste has (*m*): And a tenant in fee simple defeasible (*n*), but not a tenant in fee tail absolute (*o*), will be restrained from doing waste.

In the case of mortgages, if the mortgagor (being in possession) fells timber on the estate, the Court will restrain him, if thereby the security becomes insufficient (*p*): And, conversely, a mortgagee in possession will be restrained from felling the timber, unless the security is insufficient (*q*).

(*h*) *Southwark Waterworks* v. *Wandsworth Board*, 1898, 2 Ch. 603.
(*i*) *Garth* v. *Cotton*, 1 Dick. 183.
(*k*) *Vane* v. *Barnard*, 2 Vern. 738.
(*l*) *Micklethwaite* v. *Micklethwaite*, 1 De G. & J. 519.
(*m*) *Abrahall* v. *Bubb*, 2 Swanst. 172.
(*n*) *Turner* v. *Wright*, 2 De G. F. & J. 234.
(*o*) *Att.-Gen.* v. *Marlborough* (*Duke*), 3 Madd. 498.
(*p*) *King* v. *Smith*, 2 Hare, 239.
(*q*) *Withrington* v. *Bankes*, Sel. Ch. Ca. 31.

(1a) Waste,—kinds of, which are not remediable in equity.

But the jurisdiction in equity never extended to cases of permissive waste by a tenant for life (whether legal (*r*) or equitable (*s*)),—Who therefore would not have been enforced to do the necessary *repairs* to houses (*t*). But the tenant for life is, of course, liable in damages for his neglect to repair (*u*),—such liability (in the case of settled leaseholds) being to the estate (*x*), and not to the next remainderman (*y*); but (in the case of settled freeholds or copyholds) being to the next remainderman (*z*): *Sed quære* (*a*). Also, as regards *ameliorative* waste,—by (*e.g.*) the conversion of warehouse property into residential property more calculated to let and otherwise more valuable,—although equity did at one time interfere by injunction to stay it (*b*),—equity will not now stay it (*c*): Also, apparent waste may not be real waste, the "*usage of the estate*" sometimes enabling a tenant for life (although impeachable for waste) to cut timber (*d*).

(2) Nuisances, public, causing special damage,—ground for civil action,—

Secondly, *In the case of Nuisances.*—If the nuisance is a *public* nuisance, an indictment (or a criminal information) for it, lies to punish the offender. But a civil information also lies in equity, to redress the grievance by way of injunction (*e*): Also,—sometimes, but very rarely,—the remedy by *abatement* is available (*f*): And as regards the civil information, that is at the suit of the Attorney-General; but where a private person also suffers some special and distinct damage, he individually (and in respect of such special damage (*g*)) may sue, adding or not adding the Attorney-General as a party to the action (*h*): And a *public body*, suing in respect of a public nuisance, is like a private individual so suing,

(*r*) *Powys* v. *Blagrave*, 4 De G. M. & G. 448.
(*s*) *Freke* v. *Calmady*, 32 Ch. D. 408.
(*t*) *Tomlinson* v. *Andrew*, 1898, 1 Ch. Div. 232.
(*u*) *In re Gjers*, 1899, 2 Ch. 54.
(*x*) *In re Betty*, 1899, 1 Ch. 821.
(*y*) *In re Parry and Hopkin*, 1900, 1 Ch. 160.
(*z*) *Avis* v. *Newman*, 41 Ch. D. 532.
(*a*) *Lacon* v. *Lacon*, 1911, 1 Ch. D. 351; *Powys* v. *Blagrave*, Kay, 495.
(*b*) *Smyth* v. *Carter*, 18 Beav. 78.
(*c*) *Doherty* v. *Allman*, 3 App. Ca. 709.
(*d*) *Dashwood* v. *Magniac*, 1891, 3 Ch. 306.
(*e*) *Att.-Gen.* v. *Brighton Stores*, 1900, 1 Ch. 276.
(*f*) *Campbell-Davys* v. *Lloyd*, 1901, 2 Ch. 518.
(*g*) *Wallasey Local Board* v. *Gracey*, 36 Ch. Div. 593.
(*h*) *Marriott* v. *East Grinstead*, 1909, 1 Ch. 70.

unless legalized by statute.

—and must either show special damage (*i*) or else some injury to a private right of property in itself (*k*). But where the nuisance is legalised by statute, neither an indictment nor an information (civil or criminal) nor an action will lie for it: But the legalising statute is always very strictly construed (*l*); and a statute which authorises some nuisance in the first construction of the works, will not be read as authorising the continuance of such a nuisance afterwards (*m*): Also, sometimes the statute does not authorise the nuisance at all (*n*),—and sometimes even expressly reserves the liability for the nuisance (*o*): Lastly, a nuisance may arise from some mere excess in what would otherwise be merely the lawful user of (*e.g.*) a highway or public general road (*p*); or of a stone-quarry (*q*); or of a stinks-generator or refuse-destructor (*r*).

Nuisances,—private,—abatement of, by the party.

Nuisances, private,—and common trespasses,—when and when not they will be restrained by injunction.

On the other hand, if the nuisance is a *private* nuisance, —It may be of such a character as that the party may simply abate it (*s*); or it may be too slight for the Court to interfere,—*Scil.*, Because (for the interposition of the Court), there must, in general, be such an injury as (from its nature) is not susceptible of being adequately compensated in damages at law,—or which (from its continuance and permanently or increasingly mischievous character) must occasion a constantly recurring grievance (*t*): For example, a mere *common trespass* is not remediable by injunction,—unless where there is "*a claim of right*" to do the act and nothing to justify the claim (*u*): And even where there is a sort of sullen claim of right, but the assertion of it is unattended with any present or prospective damage, an injunction will be refused, and a declaration of right merely will be made (*x*).

(*i*) *Tottenham District Council* v. *Williamson*, 1896, 2 Q. B. 353.
(*k*) *Pudsey Gas Co.* v. *Bradford Corporation*, L. R. 15 Eq. 167.
(*l*) *Metropolitan Asylum* v. *Hill*, 6 App. Ca. 193.
(*m*) *Meux* v. *City Electric Lighting Co.*, 1895, 1 Q. B. 287.
(*n*) *Jordeson* v. *Sutton Gas Co.*, 1898, 2 Ch. 614.
(*o*) *Midwood* v. *Manchester Corporation*, 1905, 2 K. B. 597.
(*p*) *Att.-Gen.* v. *Scott*, 1905, 2 K. B. 160.
(*q*) *Thomas* v. *Oakley*, 18 Ves. 184.
(*r*) *Chastey* v. *Ackland*, 1895, 2 Ch. 389.
(*s*) *Lemmon* v. *Webb*, 1895, A. C. 1.
(*t*) *Fleming* v. *Hislop*, 11 App. Ca. 686.
(*u*) *Sturges* v. *Bridgman*, 11 Ch. Div. 852.
(*x*) *Behrens* v. *Richards*, 1905, 2 Ch. 614.

Again, a mere fanciful diminution in the value of property will not furnish any foundation for an injunction (*y*); and an injunction will not be granted, to restrain the ordinary use of adjoining premises, for purposes not in themselves noxious although some damage may result from the use (*z*); but a stricter rule is applicable, where the adjoining premises have been artificially prepared for the particular use thereof,—and are not in their ordinary condition (*a*): Also, where the injury is serious and *irreparable*,—loss of health (*b*), loss of trade (*c*), or permanent ruin to property (*d*), ensuing (or probably ensuing) from it,—the Court will interfere by injunction. And, *nota bene*, the nuisance of noise may be found to exist even in a noisy neighbourhood, where you have gone (of your own choice) to reside (*e*).

Darkening ancient lights.

Also, where one person builds so near the house of another as to darken his windows,—against the clear right of the latter, either by contract (*f*) or by ancient possession (*g*),—the Court will interfere by injunction to prevent the nuisance thereby occasioned (*h*), unless where damages would be adequate as compensation for it (*i*): And the same law is applicable also to the access of air (*k*), through (and to) a defined aperture (*l*). Also, generally, all *continuing* nuisances will be restrained, the continuance being deemed a *repetition* of the nuisance (*m*); and the owner of land lying vacant and unoccupied, is answerable for any continuing nuisance thereon (*n*).

Obstructing access of air.

Right to lateral support.

A landowner having a right (independently of prescription) to the *lateral* support of his neighbour's land

(*y*) *Att.-Gen.* v. *Nichol*, 16 Ves. 342.
(*z*) *Ball* v. *Ray*, L. R. 8 Ch. App. 467.
(*a*) *Broder* v. *Saillard*, 2 Ch. D. 692.
(*b*) *Sanders-Clark's case*, 1900, 2 Ch. 373.
(*c*) *Christie* v. *Davey*, 1893, 1 Ch. 316.
(*d*) *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. Ca. 653.
(*e*) *Rushmer* v. *Polsue*, 1907, A. C. 121.
(*f*) *Wilson* v. *Queen's Club*, 1891, 3 Ch. 522.
(*g*) *Warren* v. *Brown*, 1902, 1 K. B. 15.
(*h*) *Home and Colonial Stores* v. *Colls*, 1904, A. C. 179.
(*i*) *Parker* v. *First Avenue Hotel Co.*, 24 Ch. Div. 252.
(*k*) *Aldin* v. *Latimer*, 1894, 2 Ch. 437.
(*l*) *Chastey* v. *Ackland*, 1895, 2 Ch. 389.
(*m*) *Jenks* v. *Clifden*, 1897, 1 Ch. 694.
(*n*) *Att.-Gen.* v. *Tod-Heatley*, 1897, 1 Ch. 560.

to sustain his own land in its natural state,—and (after twenty years' enjoyment) a right to *lateral* support for the buildings also on his land,—the Court will, in maintenance of such right, and even where the subsidence is *apprehended* only, grant an injunction (*o*),—and although the support should arise only from "*running silt*" (being a mixture of water and sand (*p*)), or (*semble*) from stagnant mine water (*q*).

Pollution and further pollution of streams.

Also, a landowner will be protected against the flooding of his own lands by his neighbour (*r*): And the Court will interfere also to prevent the pollution of streams, causing injury to the riparian owners,—*Scil.*, at the suit of such owners (*s*),—and (in one and the same action) against all the polluting owners (*t*),—or (it may be) against any one of such owners (where the wrongful act of the other or others of them is no excuse to the defendant (*u*)), —especially where either there is a claim of right to pollute, or the continuance of the pollution might grow into a right (*x*); and the Court will also interfere (by injunction) to prevent the further pollution of a stream that is already comparatively polluted (*y*),—and to prevent also the pollution or further pollution of underground water (*z*).

Where the property from which the nuisance proceeds is in lease, the reversioner may be (or may not be) liable therefor, equally with the occupying tenant; and the material question in all this class of cases is,—Did the nuisance already exist at the date of the letting, or did it first emerge subsequently (*a*)?

Injunctions against Local Boards,—when obtainable; and

But, for things which are done under the powers of the Public Health Act, 1875, and which occasion injury,—The

(*o*) *Siddons* v. *Short*, 2 C. P. D. 572.
(*p*) *Jordeson's ease*, 1899, 2 Ch. 217.
(*q*) *Littledale* v. *Lonsdale*, 1899, 2 Ch. 217.
(*r*) *Evans* v. *Manchester and Sheffield R. C.*, 36 Ch. Div. 626.
(*s*) *Kensit* v. *Great Eastern R. C.*, 27 Ch. Div. 122.
(*t*) *Cowan* v. *Buccleuch* (*Duke*), 2 App. Ca. 344.
(*u*) *Ogston* v. *Aberdeen Tramways*, 1897, A. C. 111.
(*x*) *Att.-Gen.* v. *Birmingham*, 4 K. & J. 546.
(*y*) *Crossley* v. *Lightowler*, L. R. 2 Ch. App. 478.
(*z*) *Ballard* v. *Tomlinson*, 29 Ch. Div. 115.
(*a*) *Bowen* v. *Anderson*, 1894, 1 Q. B. 164.

when the injury is only one for compensation.

plaintiff, usually, obtains only compensation therefor under s. 308 of the Act (*b*), first giving notice to the defendant board under s. 264 of the Act: However, when the matter is not one for compensation under s. 308, but is a nuisance, he may have an injunction against the continuance of the nuisance (*c*),—and that, without first giving the defendant board notice (*d*): And the like rules apply substantially to injuries (to ancient lights) done under the provisions of the Artisans' Dwellings Improvement Acts (*e*). But local authorities, although they will be enjoined against wrongful positive acts (*f*),—still their mere wrongful *omissions* will not (usually) be enjoined,—the specific remedy therefor which is prescribed by the relevant statute being available: Which remedy may be (and usually is) the only remedy (*g*),—neither an injunction (*h*) nor a mandamus (*i*) being available,—although a declaration of right, with liberty to apply for an injunction, will sometimes be available (*k*).

Discretion of Court,—to grant or not to grant an injunction, in public matters.

It is to be noted also, generally, that the injunction is in the discretion of the Court,—to grant it or not to grant it,—in the case of a nuisance (whether public or private), —*Scil.*, because what the Court regards (and exclusively regards) is the injury to property: Therefore, delay or acquiescence on the part of the plaintiff, complaining of a nuisance, will be a good ground for refusing an interlocutory injunction,—and even (if the case be otherwise proper) for refusing an injunction at the hearing or trial of the action,—and that as against the Attorney-General even (suing as a relator), equally (or almost equally) as against a private person suing (*l*).

(*b*) *Durrant* v. *Branksome District Council*, 1897, 2 Ch. 291.
(*c*) *Sellors* v. *Matlock Bath (Local Board)*, 14 Q. B. D. 928.
(*d*) *Chapman* v. *Auckland Union*, 23 Q. B. D. 294.
(*e*) *Wigram* v. *Fryer*, 36 Ch. Div. 87.
(*f*) *Harrington (Earl)* v. *Derby Corporation*, 1905, 1 Ch. 205; *Att.-Gen.* v. *Birmingham Drainage*, 1908, 2 Ch. 551; and *Jones's case*, 1911, 1 Ch. 393.
(*g*) *Brown* v. *Dunstable Corporation*, 1899, 2 Ch. 378.
(*h*) *Robinson* v. *Workington Corporation*, 1897, 1 Q. B. 619.
(*i*) *Pasmore* v. *Oswaldtwistle District Council*, 1898, A. C. 387.
(*k*) *Islington Vestry* v. *Hornsey Council*, 1900, 1 Ch. 698.
(*l*) *Att.-Gen.* v. *Sheffield Gas Consumers*, 3 De G. M. & G. 304, on p. 324, cited and followed in *Att.-Gen.* v. *Grand Junction Canal*, 1909, 2 Ch. 505.

(3) Libel, slander, &c.,—injunction to restrain the utterance or repetition of.

Thirdly, *In the case of Libels, Slanders,* &c.—Since the Judicature Acts, the Courts have (increasingly) interposed to restrain (by injunction) the utterance of libels, slanders, injurious trade circulars or trade notices, and the like (*m*),—but not the mere puffs of rival traders (*n*): And the Courts will (in some cases of such injurious publications) even grant a mandatory injunction, ordering the defendant to withdraw the injurious notices (*o*). Also, all breaches of good faith between traders (*p*),—and others (*q*),—may be restrained by injunction,—*Scil.*, where the duty of good faith pre-exists; and the solicitor acting for the plaintiff in an action, may not discharge himself and go over to the defendant,—nor, if discharged by the plaintiff even, may he communicate to the defendant what he has come to know as the solicitor for the plaintiff (*r*). Also, under the 58 & 59 Vict. c. 40 (as regards parliamentary elections), and under 1 & 2 Geo. V. c. 7 (as regards municipal elections), false statements which are personally defamatory of the candidate may be restrained by injunction:

Injunction against trade circular,—unless action commenced forthwith.

Also, under the Patents and Designs Act, 1907 (7 Edw. VII. c. 29), s. 36 (as to patents) and s. 61 (as to designs),—re-enacting the like provisions contained in the Patents. Designs, and Trade-Marks Act, 1883 (46 & 47 Vict. c. 57), s. 32,—Any person who (by circular or otherwise) threatens with legal proceedings (as for an infringement of his patent or design) any other person, must forthwith commence and duly prosecute his action,—which must be no "*sham action,*"—for the alleged infringement,—Otherwise the threatened party may have an injunction against the continuance of the threats (*s*).

As regards "*boycotting* (*t*),—and also *watching and be-*

(*m*) *Thorley's Cattle Food Co.* v. *Massam*, 14 Ch. Div. 763.
(*n*) *Mellin* v. *White*, 1895, A. C. 154.
(*o*) *Herman Loog* v. *Bean*, 26 Ch. Div. 306.
(*p*) *Helmore* v. *Smith*, 35 Ch. D. 449; *Measures, Limited* v. *Measures*, 1910, 1 Ch. 336.
(*q*) *Robb* v. *Green*, 1895, 2 Q. B. 1.
(*r*) *Little* v. *Kingswood Colliery*, 20 Ch. D. 733.
(*s*) *Driffield Co.* v. *Waterloo Co.*, 31 Ch. Div. 638.
(*t*) *Mogul S.S. Co.* v. *Macgregor*, 1892, A. C. 25.

setting" (*u*),—the Court will occasionally interfere (by injunction); but the Court must first see its way to enforcing compliance with the injunction (*x*): But, as regards the expulsion of a member from his club, the Court will grant an injunction against such expulsion,—if the member has not had an opportunity of being heard (*y*), that being a matter of substance, and not a mere irregularity (*z*); but the Court will not grant any such relief, where the club is a proprietary one (*a*): Also, a member of a trade union may have an order which shall (in effect) restrain his expulsion,—and so restore him to membership (*b*): Also, there may be (but usually there will not be) an injunction against the removal of a Preacher (*c*), or of a Schoolmaster (*d*).

Injunction, enforcement of.

An injunction (once it has been granted) will be enforced (by committal for contempt),—against not only the parties enjoined, but also against all others knowingly abetting them in their breach of the injunction (*e*).

(4) Patents, copyrights, and trade-marks.

Fourthly, *In the case of Patents, Copyrights, and Trade-Marks*,—In order to prevent multiplicity of suits, equity habitually interfered (by injunction) to secure the rights of inventors and manufacturers, authors, traders, and the like,—and (as incidental to the injunction) granted relief by way of account: And, firstly,—

(A) Patents,—Injunction not a matter of course.

(*A*) In the case of Patents.—If the patent is a recent one, and its validity has not been established, the Court requires the validity of the patent (if denied or put in doubt) to be first established before an interim injunction will be granted,—the Court itself, now, trying the question of validity (*f*): And, in the meantime (and until

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(*u*) *Charnock* v. *Court*, 1899, 2 Ch. 36.
(*x*) *Lyons* v. *Wilkins*, 1896, 1 Ch. 811.
(*y*) *Fisher* v. *Jackson*, 1891, 2 Ch. 692.
(*z*) *Andrews* v. *Mitchell*, 1905, A. C. 78.
(*a*) *Baird* v. *Wells*, 44 Ch. Div. 661.
(*b*) *Osborne's case*, 1911, 1 Ch. 540; and disting. *Chamberlain's Wharf* v. *Smith*, 1900, 2 Ch. 605.
(*c*) *Daugars* v. *Rivaz*, 28 Beav. 233.
(*d*) *Hayman* v. *Rugby School*, L. R. 18 Eq. 76.
(*e*) *Seaward* v. *Paterson*, 1897, 1 Ch. 545.
(*f*) *Badische* v. *Levenstein*, 12 App. Ca. 710.

that question has been determined), the Court may grant an *interim* injunction,—*Scil.*, upon the plaintiff (*g*) (unless he be the Attorney-General (*h*)) giving an undertaking as to damages: Or the Court may simply require the defendant to keep an account in the meantime (*i*): And,—eventually,—at the trial, it will be necessary, of course, for the plaintiff to prove his patent and the validity thereof, and also that the defendant has infringed same: And in order to facilitate the trial, the defendant delivers "particulars of his objections"; and the plaintiff delivers "particulars of the breaches." And, *nota bene*, the usual objections to the validity of the patent, are want of novelty, want of utility, and insufficiency in the specification: Also, the defences most usually raised to the action are prior publication and inutility.

And note, that a foreign patent is now no good in England,—but will be revoked,—unless it is being *de facto* worked in England (*k*), or has been and is being *bonâ fide* attempted to be worked in England (*l*): And, *semble*, a patent, the term of which has been extended once, will not be extended twice (*m*).

(B) Copyright,—What is, and what is not, the subject of.

(*B*) COPYRIGHTS.—The plaintiff who sues in respect of an alleged piracy of his copyright must, of course, prove his title to the copyright (*n*): Also, he can have no copyright in an irreligious immoral or obscene publication (*o*), —or in "*racing finals*" (*p*); but (subject to that qualification) there may be copyright in "books,"—and in encyclopædias, music, engraving, sculpture, painting, photography, and the like,—and (under special circumstances) even in an unpublished manuscript: And note, that where one man is the author and another man is the publisher of a book, the author may have retained the

"Author and publisher" agreements,—copyright under.

(*g*) *Dreyfus* v. *Peruvian Guano Co.*, 1892, A. C. 166.
(*h*) *Att.-Gen.* v. *Albany Hotel Co.*, 1896, 2 Ch. 696.
(*i*) *Bacon* v. *Jones*, 4 My. & Cr. 433, 436.
(*k*) *Ex parte Zerenner*, 1909, 2 Ch. 68.
(*l*) *In re Bremer's Patent*, 1909, 2 Ch. 217.
(*m*) *In re Thompson's Patent*, 1909, 2 Ch. 447.
(*n*) *Johnson* v. *Newnes*, 1894, 3 Ch. 663.
(*o*) *Lawrence* v. *Smith*, Jac. 472.
(*p*) *Chilton* v. *Progress Co.*, 1895, 2 Ch. 29.

copyright in himself,—merely agreeing with the publisher in respect of the publication of the book (*q*): Or he may have assigned his copyright outright to the publisher (*r*), —And the question, as to whether the author remains entitled to the copyright, or whether the publisher has become the assignee of the right, depends (simply and merely) upon the construction of the agreement between the author and the publisher: Also, in every case, before a plaintiff can sue in respect of his statutory copyright and for any alleged piracy thereof, he must (whether he be the original author of the book (*s*), or be a subsequent assignee of the author (*t*)) have first registered his copyright,—But such prior registration is not necessary, *semble*, in the case of a copyright by common law (*u*).

Registration, —requisite of before suing.

The action for an alleged infringement of the copyright usually claims an injunction,—and either damages or else an account of the profits: And in the action,—assuming that the right to the copyright exists, and exists in the plaintiff,—the principal question at the trial is, whether there has been an infringement: Now, it is not an infringement of the copyright in a book, to make *bonâ fide* quotations or extracts from it; or to make a *bonâ fide* abridgment of it; or to make a *bonâ fide* use of the same common materials in the composition of another work: But what constitutes a *bonâ fide* use of extracts (or a *bonâ fide* abridgment, or a *bonâ fide* use of common materials), is often a matter of the most embarrassing inquiry,—the question usually being, whether there has been a legitimate and fair exercise of mental ability, industry, and discrimination resulting in the production of a new work (*x*), —Because, if, instead of searching into the common sources in an independent and critical manner (and deriving therefrom the materials which he chooses to appropriate), an author should quietly and servilely avail

Infringement, injunction against.

Infringement of copyright,— what is, and what is not?

(*q*) *Stevens* v. *Benning*, 6 De G. M. & G. 223.
(*r*) *Ward Lock* v. *Long*, 1906, 2 Ch. 550.
(*s*) *Murray* v. *Bogue*, 1 Drew. 353.
(*t*) *Petty* v. *Taylor*, 1897, 1 Ch. 465.
(*u*) *Mansell* v. *Valley Co.*, 1908, 2 Ch. 441; and *Bowdens* v. *Amalgamated Pictorials*, 1911, 1 Ch. 386.
(*x*) *Campbell* v. *Scott*, 11 Sim. 31.

himself of the labours of his predecessor (*y*),—and adopt his arrangement,—or do it with only colourable variations,—that would not be a *bonâ fide* use of the common materials, but would be an infringement (*z*). However, it is no infringement, where an author has been led by an earlier writer to consult the authorities referred to by him,—even though he may quote the same passages from those authorities which were used by the earlier writer (*a*): And, in particular, as regards copyright in maps, road-books, calendars, &c., the materials being equally open to all (and the result also necessarily showing a certain identity or similitude), the difficulty is not only to distinguish the difference in the result, but also in detecting the unfair use of the prior publication,—So much so, that the fact of piracy has generally to be ascertained, by *the appearance in the later publication of the same inaccuracies that are to be found in the prior publication;* and even that mode of proof must be applied with caution (*b*),—and is not, of itself, conclusive of the matter (*c*).

Copyright in lectures.

As regards oral lectures, persons admitted as pupils (or otherwise) to hear them, cannot publish them for profit,—and would be restrained by injunction from so doing (*d*): But the reporter (or his employer) acquires a right in the report,—and may restrain any rival publisher from using it (*e*). And it appears also, that (practically) there may be a valid copyright in the mere title of a book (*f*); but this has been questioned (*g*),—and is perhaps only true under special circumstances; and there may also be,—or there may practically be,—copyright in the mere external appearance of a newspaper (*h*),—and in the "Illustrations" published by tradesmen in their catalogues (*i*); and in the "Headings" in a trade directory (*k*), although the

Copyright in title of book:

and in illustrations, headings, &c.

(*y*) *Weatherby* v. *International Horse Agency*, 1910, 2 Ch. 297.
(*z*) *Leslie* v. *Young*, 1894, A. C. 335.
(*a*) *Pike* v. *Nicholas*, L. R. 5 Ch. App. 251.
(*b*) *Leslie* v. *Young*, *supra*.
(*c*) *Weatherby* v. *International Horse Agency*, *supra*.
(*d*) *Caird* v. *Sime*, 12 App. Ca. 326.
(*e*) *Walter* v. *Lane*, 1900, App. Ca. 39.
(*f*) *Weldon* v. *Dicks*, 10 Ch. Div. 247.
(*g*) *Schove* v. *Schmincke*, 33 Ch. Div. 546.
(*h*) *Walter* v. *Steinkoff*, 1892, 3 Ch. 489.
(*i*) *Maple's case*, 21 Ch. Div. 369.
(*k*) *Lamb* v. *Evans*, 1893, 1 Ch. 218.

entire catalogue or entire directory may not have been copyrighted.

"*Scenic accessories*" may, *semble*, be pirated with impunity (*l*): But, as regards sketches of *tableaux vivants* (with explanatory letterpress),—the *tableaux vivants* being representations of pictures in which the plaintiff has copyright,—although these are not (*m*) (and the living pictures themselves are not (*n*)) an infringement of the plaintiff's copyright, still the background may be so (*o*): And as regards photographs, it is always a question, whether the copyright in the photograph belongs to the photographer (*p*), or to the person for whose use (or by whose permission) the photograph has been made (*q*): But, in either case, the photograph may not (by reproduction from the negative) be sold or distributed broadcast, where that would be a breach of confidence on the photographer's part (*r*): Also, *nota bene*, a photographic reproduction of a picture,—being some picture which has been copyrighted as a work of art,—may be an infringement of the copyright in the picture,—especially if the photograph "*vulgarises*" the picture (*s*); and, at the same time, a wool-work pattern, reproducing a well-known picture ("The Huguenot"), has been held to be no infringement (*t*).

Photographs, copyright in.

As regards private letters (whether on literary subjects, or on private personal matters),—The writer has a qualified property in them,—and may obtain an injunction to restrain their publication by the party written to (*u*); and the party written to has a qualified property in them,—and may restrain the publication of them by a stranger (*x*): But the qualified right may (in either case)

Copyright in private letters,—

Assignment of the copyright

(*l*) *Tate* v. *Fullbrook*, 1908, 1 K. B. 821.
(*m*) *Hanfstaengl* v. *Newnes*, 1894, 3 Ch. 109.
(*n*) *Hanfstaengl* v. *Empire Palace*, 1894, 3 Ch. 109.
(*o*) *Hanfstaengl* v. *Empire Palace*, 1895, W. N. p. 76.
(*p*) *Bowcas* v. *Cooke*, 1903, 2 K. B. 235.
(*q*) *Stackeman* v. *Paton*, 1906, 1 Ch. 774.
(*r*) *Pollard* v. *Photographic Co.*, 40 Ch. D. 345.
(*s*) *Hanfstaengl* v. *Smith*, 1905, 1 Ch. 519.
(*t*) *Dicks* v. *Brooks*, 15 Ch. D. 22.
(*u*) *Gee* v. *Pritchard*, 2 Swanst. 402.
(*x*) *Thompson* v. *Stanhope*, Amb. 737.

in, and subsequent sale of, the letters themselves,—effect of.

be displaced (*y*): And it rather appears, that (as regards private letters which have not been published in the writer's lifetime) the right to publish them after his death is in the proprietor of the letters; and if that proprietor should first sell and assign to the plaintiff the right of publication, and should afterwards sell the letters themselves to the defendant, the defendant will not (under the sale to him) acquire the right of publication also (*z*).

Copyright in unpublished manuscript.

As regards an unpublished manuscript, an injunction will (in a proper case) be granted,—to restrain the publication thereof (*a*); and copies (even manuscript copies) of a tale may not be lawfully made,—for the otherwise lawful purpose of dramatising it (*b*).

Successive editions,—growing piracy in.

In case the first edition of an alleged piratical work is not considered (by the proprietor of a prior existing copyright) to be of sufficiently injurious character to justify him in commencing at once an action for the infringement of his copyright,—He will not (by this apparent but justifiable neglect) be afterwards prejudiced in his action for the infringement, if the second (or other subsequent) edition shows greater marks of piracy (*c*).

(C) Trade-marks,—Injunction against use of trade-marks, used not to depend on property, but on fraud;

(*C*) TRADE-MARKS.—As regards trade-marks, the right to protection (prior to the Trade-Marks Registration Acts, 1875-76) did not depend upon any property in them, but *the Court would not allow a fraud to be practised upon private individuals or upon the public* by the "*passing off*" of A.'s goods as the goods of B. (*d*): That is to say, the common law right to a trade-mark (or trade name) was merely the right which any one had, to prevent others from selling the like goods in such a way (*i.e.*, by such a mark) *as to mislead the public* (*e*); while (under the

(*y*) *Perceval* v. *Phipps*, 2 V. & B. 19.
(*z*) *Macmillan* v. *Dent*, 1907, 1 Ch. 107.
(*a*) *Duke of Queensberry* v. *Shebbeare*, 2 Eden, 329.
(*b*) *Warne* v. *Seebohm*, 39 Ch. Div. 73.
(*c*) *Hogg* v. *Scott*, L. R. 18 Eq. 444.
(*d*) *Bourne* v. *Swan and Edgar*, 1903, 1 Ch. 211.
(*e*) *Reddaway* v. *Banham*, 1896, App. Ca. 199.

statutes), if the trade-mark (or trade-name) is proper to register and has been duly registered, the owner now has,—to the extent that his trade-mark has been (or is) used in connection with goods (*f*), but not further (*g*),—a true property in it,—So that even an innocent user of the trade-mark would have been liable in damages for an infringement of the trade-mark (*h*),—although the law in that particular has now been altered (*i*),—and he is still liable to be restrained by injunction (*k*).

May now depend on property.

And with regard to the registration of single words as trade-marks,—It appears, that if they have been used before 1875, they may be registered (*l*): Also, by s. 64 of the Patents, &c., Act, 1883, any "fancy-word" might have been so registered (*m*), provided it was used as a distinctive word, and not for a fraudulent purpose (*n*); and by s. 10 of the Patents, &c., Act, 1888 (repealing s. 64 of the Act of 1883) the "fancy-word" required to be an "invented word" (*o*), or a word which had no reference to the character or quality of the goods, and was not a "geographical name" (*p*),—For example, "Mazawattee" for tea (*q*), "Trilby" for ladies' hosiery (*r*), "Solio" for photographic materials (*s*), and "Bovril" for beef-extract (*t*): Also, the "portrait" of the maker was considered a distinctive device for cough-lozenges; and a "Magnolia flower" for metals,—Because, generally, a thing of beauty which is registrable as a design may also be registrable as a trade-mark (*u*),—and the less congruous it is, the better, *semble*. And now, by the 5 Edw. VII.

"Fancy words,"—registration of.

(*f*) *Cellular Clothing* v. *Maxton*, 1899, App. Ca. 326.
(*g*) *Batt* v. *Dunnett*, 1899, App. Ca. 428.
(*h*) *Upmann* v. *Forester*, 24 Ch. Div. 231.
(*i*) 7 Edw. VII. c. 28, s. 27; and c. 29, s. 33.
(*k*) *Slazenger* v. *Spalding*, 1910, 1 Ch. 257.
(*l*) *Vaseline Trade Mark*, 1902, 2 Ch. 1.
(*m*) *Wood* v. *Lambert*, 32 Ch. Div. 247.
(*n*) *Eno* v. *Dunn*, 15 App. Ca. 252.
(*o*) *Re Cyclostyle*, 1907, 2 Ch. 478.
(*p*) *Caledonia Springs case*, 1904, A. C. 103.
(*q*) *In re Densham's Trade Mark*, 1895, 2 Ch. 176.
(*r*) *In re Holt & Co.'s Trade Mark*, 1896, 1 Ch. 711.
(*s*) *Eastman* v. *Comptroller*, 1898, App. Ca. 571.
(*t*) *In re Trade Mark "Bovril,"* 1876, 2 Ch. 600.
(*u*) *Playing Cards case*, 1908, 1 Ch. 197.

c. 15, s. 8,—which is in substitution for s. 64 of the Act of 1883, and in substitution also for s. 10 of the Act of 1888,—Among the "*essential particulars*" for a registrable trade-mark are included an invented word or words, and a word or words having no direct reference to the character or quality of the goods (and not being, according to its ordinary signification, a geographical name or a surname (*x*)): However, any distinctive word, which was in use as a trade-mark before the 13th August, 1875, continues to be registrable as a trade-mark (*y*); and, as regards the use of the royal arms in connection with any trade,—these may be validly used, provided they are more or less modified (*z*); but it is vastly safer, not to use them without first obtaining authority to do so (*a*).

Fraud still continues an independent ground for an injunction.

In *Burgess* v. *Burgess* (*b*), where a father had for many years exclusively sold an article under the title of "Burgess's Essence of Anchovies," the Court refused to restrain his son from selling a similar article under that name,—the name "*Burgess*" belonging to the son quite as much as to the father, and *no fraud being proved:* But a limited company, established by the son, would not have had the privileges of the son; and, in *Cocks* v. *Chandler* (*c*), a rival manufacturer of sauce was restrained (at the suit of the original inventor) from selling his preparation under the name of "The *Original* Reading Sauce,"—the word "*original*," showing an intention of deceit: And (for the like reason) the use of the words "*Yorkshire Relish*"(*d*), "*Club Soda*"(*e*), "*Camel Hair Belting*"(*f*), and "*Cash's Frillings*"(*g*), has been restrained; and any inequitable use of the phrase "*The Times*," will be restrained (*h*).

(*x*) See 1910, 1 Ch. 130, and 2 Ch. 590.
(*y*) *In re Apollinaris Trade Mark*, 1907, 2 Ch. 178.
(*z*) *In re Konig's Application*, 1896, 2 Ch. 236.
(*a*) *Royal Corsets case*, 1909, 1 Ch. 459.
(*b*) 3 De G. M. & G. 897.
(*c*) L. R. 11 Eq. 446.
(*d*) *Powell* v. *Birmingham*, 1897, A. C. 710.
(*e*) *Cochrane* v. *McNish*, 1896, A. C. 225.
(*f*) *Reddaway* v. *Banham*, 1896, A. C. 199.
(*g*) *Cash, Limited* v. *Cash*, 1901, W. N. 46.
(*h*) *Walter* v. *Ashton*, 1902, 2 Ch. 282.

By Lord Cairns's Act (*i*),—*In all cases in which a Court of Equity has jurisdiction* in injunction or in specific performance, the Court (if it thinks fit) may award damages, *either in addition to or in substitution for* the other relief: And upon that statute, these points have been decided,— Lord Cairns's Act,—provisions of, as to damages; also interpretation of.

(1) That the jurisdiction in equity is not extended thereby, to cases where there is a plain common law remedy (*k*);

(2) That there can be no relief (*Scil.*, under that Act) in a Court of Equity, where the bill is filed for damages only (*l*),—but only where the damages are *incidental* to the injunction (*m*);

(3) That the Court cannot (in its discretion) give damages in lieu of an injunction, where the plaintiff makes out a case for an injunction (*n*),—especially where the nuisance is a continuing one (*o*); And

(4) Where the Court has jurisdiction to compel specific performance of *part* of a contract, it may award damages for the breach of any other *part* of the contract (*p*).

But (5) If the remedy for an injunction is altogether gone, the Court cannot (under the Act) give damages even (*q*): Nevertheless, where the Court sees that a legal wrong has been committed in respect of which an injunction ought to issue, but it is impossible to frame any form of injunction, the Court will give damages (*r*): But if the wrong is merely a dishonour, *and infringes no legal or equitable* RIGHT *of the plaintiff*, there is no remedy at all, either by injunction or in damages (*s*): Also, if the wrong is merely political, no injunction will issue in respect thereof,—save in respect of any property-rights which may be affected (*t*). When damages only,—and when not even damages,—recoverable.

(*i*) 21 & 22 Vict. c. 27.
(*k*) *Wicks* v. *Hunt*, Johnson, 380.
(*l*) *Lewers* v. *Earl of Shaftesbury*, L. R. 2 Eq. 270.
(*m*) *Holland* v. *Worley*, 26 Ch. Div. 578.
(*n*) *Imperial Gas Light* v. *Broadbent*, 7 H. L. Ca. 600; *Shelfer's case*, 1895, 1 Ch. 287; *Chester* (*Dean, &c.*) v. *Smelting Corporation*, 1901, W. N. 179.
(*o*) *Meux* v. *City Electric Lighting Co.*, 1895, 1 Q. B. 287; *Cowper* v. *Laidler*, 1903, 2 Ch. 337.
(*p*) *Soames* v. *Edge*, John. 669.
(*q*) *Lavery* v. *Pursell*, 39 Ch. Div. 508.
(*r*) *Saccharin Corporation case*, 1900, 2 Ch. 246.
(*s*) *Cowley* v. *Cowley*, 1900, P. 305; 1901, A. C. 450.
(*t*) *Austria* (*Emperor*) v. *Day*, 3 De G. F. & J. 217.

CHAPTER XI.

PARTITION.

Jurisdiction of equity,—grounds of.

THE common law always allowed co-parceners to compel a partition; and the statutes 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, gave the like right to joint tenants and to tenants in common (*a*). But the common law remedy (which was by "*writ of partition*") was early found to be inadequate and incomplete; and equity accordingly assumed a general *concurrent* jurisdiction in all cases of partition (*b*).

Cases for partition.

A partition action may be maintained by any freehold tenant in possession,—and that, whether he be entitled in fee simple, or in fee tail, or for life (*c*), or for any other freehold estate (*d*); and the judgment is binding on the remaindermen and reversioners (*e*). But the action is not maintainable by a person entitled only in remainder or reversion (*f*); and a partition will not be granted during the continuance of any overriding power or trust (*g*): Nor will the action properly lie, where the purpose of it is, in reality, to prove an adverse legal title (*h*),—the titles of the parties being required (in every partition action) to have one common root (*i*). Also, where there has already been a partition *in pais*, the Court cannot decree a partition,—Because the undivided entirety would first have to be reconstituted, in order to partition it (*k*); and

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(*a*) *Mayfair Property Co.* v. *Johnston*, 1894, 1 Ch. 508.
(*b*) *Agar* v. *Fairfax*, L. R. 2 Eq. 440.
(*c*) *Wills* v. *Slade*, 6 Ves. 498.
(*d*) *Hobson* v. *Sherwood*, 4 Beav. 184.
(*e*) *Gaskell* v. *Gaskell*, 6 Sim. 643.
(*f*) *Evans* v. *Bagshaw*, L. R. 5 Ch. App. 340.
(*g*) *Boyd* v. *Allen*, 24 Ch. Div. 622; *In re Horsnaill*, 1909, 1 Ch. 631.
(*h*) *Waite* v. *Bingley*, 21 Ch. D. 674.
(*i*) *Miller* v. *Warmington*, 1 Jac. & W. 493.
(*k*) *Ceylon case*, 1905, A. C. 383.

the partition *in pais* will be effective enough without more (*l*).

Properties of which a partition may be decreed.

The properties of which a partition may be decreed include manors and freehold corporeal estates generally (*m*); also, advowsons (*n*), and rent-charges (*o*); also, leaseholds for years (*p*); and [since the Copyhold Act, 1841 (4 & 5 Vict. c. 35), now repealed, but its provisions in this particular re-enacted, by the Copyhold Act, 1894 (57 & 58 Vict. c. 46)] copyhold hereditaments (*q*).

Provisions of Trustee Act, 1893,—when persons interested are under incapacity;

Difficulties occasionally arose in the partition, from the infancy or lunacy of one or more of the persons interested in the property (*r*): And, in order to meet these difficulties (and delays), it has been provided by successive statutes as follows, that is to say:—By the Trustee Act, 1850 (13 & 14 Vict. c. 60), s. 30 (as regards judgments or decrees for a partition),—And by the Partition Act, 1868 (31 & 32 Vict. c. 40), s. 7 (as regards judgments for a sale in lieu of partition),—And, *now*, by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 31,—the Court is enabled to declare, that any of the parties to the action are (or will be) trustees of the land (or of any part thereof); and upon that declaration being made, Firstly, as to lunatics or persons of unsound mind, the Lord Chancellor (by virtue of the Lunacy Act, 1890, s. 135),—And secondly, as to infants and others, the Chancery Division (by virtue of the Trustee Act, 1893, s. 31),—may make an order vesting the lands (or directing a conveyance of the lands) as the order shall direct (*s*).

Also, Lunacy Act, 1890,—provisions of.

Difficulties, where properties small, of carrying partition into effect,—now remedied by

Formerly, a partition was usually made by commissioners, acting under a commission issued to inspect measure and survey,—and to apportion,—the estate among the persons entitled (*t*): And it sometimes happened, where

(*l*) *Ireland* v. *Rittle*, 1 Atk. 541.
(*m*) *Hanbury* v. *Hussey*, 14 Beav. 153.
(*n*) *Johnstone* v. *Baber*, 6 De G. M. & G. 439.
(*o*) *Rivis* v. *Watson*, 5 Mee. & W. 255.
(*p*) *Baring* v. *Nash*, 1 V. & B. 551.
(*q*) *Clarke* v. *Clayton*, 2 Giff. 333.
(*r*) *Brook* v. *Hertford*, 2 P. Wms. 518.
(*s*) *Davis* v. *Ingram*, 1897, 1 Ch. 477.
(*t*) *Watson* v. *Northumberland* (*Duke*), 11 Ves. 153; *Agar* v. *Fairfax*, 17 Ves. 533.

sale under Partition Acts, 1868 and 1876.

the property was small and the persons interested were many, that the expense of the commission was prohibitive (*u*). And accordingly, by the Partition Act, 1868 (amended by the Partition Act, 1876), in any suit in which a partition might be made, the Court may direct a sale in lieu of a partition, and a distribution of the sale-proceeds amongst the parties according to their shares and interests: That is to say,—Under the Partition Act, 1868,—(1) By s. 4, if a moiety or upwards of the co-tenants request a sale, the Court is to decree a sale,—unless the other co-tenants show reason to the contrary (the burden of proof being in this case upon the parties resisting a sale (*x*)); and (2) By ss. 3 and 5, if one or more (less than a moiety) of the co-tenants request a sale, the Court may (in its discretion) direct a sale,—Either (by s. 3), if it appears to the Court, that (by reason of the nature of the property, or of the number of the parties interested or presumptively interested or of the absence or disability of some of the parties, or of any other circumstances) a sale of the property and a distribution of the proceeds would be more beneficial than a partition,—and notwithstanding the dissent of the others; Or (by s. 5), if any co-tenant requests a sale in lieu of a partition, —unless the parties resisting the sale undertake to purchase the share of the party requesting a sale,—In which latter case, the Court may (upon such undertaking being given) order a valuation of the share of the party requesting the sale,—or may refuse altogether to direct a sale.

(a) Sect. 4,—a moiety or upwards.

(b) Sects. 3 and 5,—less than a moiety.

Judgment for partition, or for sale in lieu thereof,—form of, and mode of obtaining.

The decree or judgment directing a partition (or a sale in lieu thereof) is usually obtained on motion for judgment duly set down and taken as a short cause: And that practice is invariable, where the defendant makes default in delivering a defence; but if the defendant delivers his defence, and therein admits the plaintiff's title, the decree or judgment may be made on ordinary motion (*y*).

Sale,—mode of effectuating.

In the general case, the judgment simply refers the action to Chambers, for an inquiry as to the persons en-

(*u*) *Turner* v. *Morgan*, 8 Ves. 143; 11 Ves. 157.
(*x*) *Porter* v. *Lopes*, 7 Ch. Div. 358.
(*y*) *Burnell* v. *Burnell*, 11 Ch. Div. 213.

titled,—and directs a sale, only if it is certified that all the persons entitled are parties,—or (in effect) parties,—to the action: But where the property is small, and the title simple, and the title is made out at the hearing, an immediate sale will be directed by the judgment (*z*),—all the co-owners (other than the party having the conduct of the sale) having leave to bid: And, in the judgment, an inquiry will or may be added regarding incumbrances,—but the incumbrancers are not to be made parties to the action (*a*); and an inquiry as to an "occupation rent" may also be added,—but not as against an incumbrancer (*b*). Sometimes, also, an account will be directed of the rents and profits,—*Scil.*, for the six years next before the commencement of the action (*c*),—together with an inquiry as to money expended in permanent improvements. Also, any windfall coming to the estate pending the partition action (for example, compensation for an extinguished licence) must be paid into Court for division among the parties entitled (*d*).

The sale itself is usually carried out under the direction of the Court: But (under Order LI. Rule 1a) the Court may (with a view to avoiding expense) direct a sale altogether *out of Court*,—the proceeds of the sale being (in that case) brought into Court (*e*). And, as regards the costs of the action, these are provided for on the further consideration (*f*),—only one set of costs being allowed in respect of each share.

Costs of the action.

(*z*) *Wood* v. *Gregory*, 43 Ch. Div. 82.
(*a*) *Sinclair* v. *James*, 1894, 3 Ch. 554.
(*b*) *Hill* v. *Hickin*, 1897, 2 Ch. 579.
(*c*) *Burnell* v. *Burnell*, *supra*.
(*d*) *Birkin* v. *Smith*, 1909, 2 K. B. 112.
(*e*) *Strugnell* v. *Strugnell*, 27 Ch. Div. 258.
(*f*) *Belcher* v. *Williams*, 45 Ch. Div. 510.

CHAPTER XII.

INTERPLEADER.

Interpleader in equity,—where two or more persons claim the same thing from a third person.

INTERPLEADER in equity was, where two or more persons (whose titles were connected) claimed the same thing from a third person, and he exhibited his bill of interpleader against both, stating the several claims (and his own position in regard to the matter), and *praying that the claimants might interplead* (*a*); and in an interpleader in equity, it was essential, that the plaintiff should have had no personal interest in the subject-matter (*b*): And, *now*, the applicant for an interpleader summons must satisfy the Court, *that he claims no interest in the subject-matter in dispute* (*other than for his costs or charges* (*c*)): Also, further, the plaintiff (besides having no personal interest in the subject-matter) must have been under no personal liability to either of the claimants (*d*); but, *now*, any question of personal liability may be (and, usually, will simply be) left unprejudiced (*e*).

Cases, not proper for interpleader.

Where a landowner is (in respect of his lands) subject to some charge (*e.g.*, an annuity),—*and he is uncertain, to whom he should pay the annuity or in what proportions he should pay it, as between A., B., C., and D.*,—That is not a proper case for an interpleader (*f*). Also, where the dispute is between two rival auctioneers,—one of whom claims £35 for his commission in respect of the sale of a house, and sues the defendant for such commission; and the other of the two auctioneers claims £25 for his commission in respect of the sale of the same house,—That is

(*a*) *Jones* v. *Thomas*, 2 Sim. & Giff. 186.
(*b*) *Mitchell* v. *Hayne*, 2 Sim. & Stu. 63.
(*c*) *Gebruder* v. *Ploton*, 25 Q. B. D. 13.
(*d*) *Crawshay* v. *Thornton*, 2 My. & Cr. 1, 19.
(*e*) *Ex parte Mersey Docks*, 1899, 1 Q. B. 546.
(*f*) *Vyvyan* v. *Vyvyan*, 4 De G. F. & J. 183.

not a proper case for an interpleader (*g*),—*Scil.*, because *the dispute is not in respect of one and the same subject-matter;* and, in fact, both the commissions, or neither of them, may (under the special circumstances) be payable (*h*).

Interpleader, where one title was legal and the other equitable.

It was sufficient for an interpleader in equity, if the title of one of the claimants was equitable: And if (*e.g.*) a debt had been assigned, and a controversy arose between the assignor and the assignee, a bill of interpleader might have been brought by the debtor, to have the point settled to whom he should pay the debt (*i*).

No interpleader, formerly, in case of adverse independent legal titles: *Secus*, now.

In the case of two adverse independent legal titles, the party holding the property was not entitled to interplead in equity,—for that would have been to assume the right to try merely legal questions (*k*): But, *now*, relief by way of interpleader may be granted, wherever the person seeking the relief (and who is usually called the applicant) is (or expects to be) sued by two or more persons making *adverse* claims to the property (and who are usually called the claimants).

Agent could not have interpleaded against his principal.

An agent was not (nor is) allowed to dispute the title of his principal,—and, therefore, could not (nor can), in general, interplead: But where the principal has created an interest in (or lien on) the property in favour of a third person, and the nature and extent of that interest or lien is the only matter in controversy, the agent may have interpleader (*l*).

Tenant could not file a bill against his landlord and a stranger claiming by a paramount title.

Also, a tenant could not (nor can), in general, have interpleader against his landlord and a stranger claiming under a title adverse to the landlord,—*Scil.*, because a bill of interpleader was, where two persons claimed of a third person the *same* debt or the *same* duty; and the adverse claimant was not claiming the *same* debt,—*the rent due upon the demise being a different demand from that which some other person might have upon the occupation of the premises* (*m*). However, if

(*g*) *Greatorex* v. *Shackle*, 1895, 2 Q. B. 249.
(*h*) *Farr* v. *Ward*, 2 Mee. & W. 844.
(*i*) *Wright* v. *Ward*, 4 Russ. 215.
(*k*) *Pearson* v. *Cardon*, 2 Russ. & M. 605, 610.
(*l*) *Smith* v. *Hammond*, 6 Sim. 10.
(*m*) *Dungey* v. *Angove*, 2 Ves. 310.

Cases where a tenant might bring a bill of interpleader.

the persons claiming the *same* rent claimed in privity of contract or of tenure (as in the case of a mortgagor and a mortgagee),—The tenant (not disputing the title of his landlord, but *relying only upon the uncertainty of the person to whom he was to pay the rent*), might have had interpleader (*n*). But, *nota bene*, a defendant who set up some *jus tertii*, alleging that the title was in another and defending on that (*o*), was not interpleading at all,—but was siding with the adverse party; And sometimes, in fact, he was estopped (by his own conduct) from doing otherwise (*p*).

Sheriff seizing goods, could not have had interpleader: *Secus*, now.

Interpleader in equity would not, in general, have lain for a sheriff against two or more persons, putting forward adverse claims to the property taken in execution,—but, by the 1 & 2 Will. IV. c. 58, the benefit of interpleader was latterly (in such a case) given,—and even at law: And (by Order LVII. Rule 1) relief by way of interpleader may, *now*, be granted, wherever the applicant in interpleader is the sheriff (or other officer charged with the execution of process by or under the authority of the Court), and the case is proper for interpleader:

Affidavit of no collusion.

The plaintiff in an interpleader in equity was required (in all cases) to satisfy the Court, that he was not colluding with either of the claimants (*q*); and (under the present practice) an affidavit of no collusion is expressly required (*r*).

Procedure on interpleader.

Under the present practice, the application for an interpleader summons is made to a judge at Chambers; and if made by the defendant, it is made at any time after service of the writ in the action; and if made by the sheriff, it is made immediately after he has seized the goods in execution.

Where the sheriff interpleads, the Court may order a sale of the whole (or of any part) of the goods, without

(*n*) *Clarke* v. *Byne*, 13 Ves. 383.
(*o*) *The Winkfield*, 1902, P. 42.
(*p*) *Kingsman* v. *Kingsman*, 6 Q. B. D. 122.
(*q*) *Errington* v. *Att.-Gen.*, 1 Jac. 205.
(*r*) Ord. LVII. r. 2.

prejudice to the question of the title thereto: And the question of title may thereupon be decided summarily (*s*); but, more usually, an issue of fact (or of law) is tried on a special case stated between the claimants.

Also, under the Judicature Act, 1884 (*t*), the whole proceedings,—where the amount does not exceed £500,—may be transferred into the County Court,—the bailiff of the County Court becoming (in effect), upon such a transfer, the sheriff (*u*),—and proceeding with all the same circumspection as the sheriff (*x*).

(*s*) *Van Laun's case*, 1903, 2 K. B. 277.
(*t*) 47 & 48 Vict. c. 61.
(*u*) *Jelks* v. *Hayward*, 1905, 2 K. B. 460.
(*x*) *Wells* v. *Hughes*, 1907, 2 K. B. 845.

PART IV.

THE [NOW OBSOLETE] *AUXILIARY JURISDICTION.*

ALTHOUGH the auxiliary jurisdiction in equity is now an obsolete jurisdiction (*a*),—its place having been supplied by simpler modes of procedure,—Still the old principles, which were regulative of the jurisdiction, are helpful in applying the substituted modes of procedure: And here it is to be mentioned, that, in saying the auxiliary jurisdiction is obsolete, it is intended only, that it is obsolete *quoad* the Common Law Courts (including the Probate Division (*b*)),—and not also *quoad* Courts not consolidated together in the High Court (*c*).

The auxiliary jurisdiction (while it continued to exist) was applicable primarily to the better enforcement of *legal* rights,—and only (by a sort of analogy) was it applicable to the enforcement also of *equitable* rights: And, in the case of *legal* rights, the decision of the Common Law Court was conclusive in equity (*d*); but, in the case of *equitable* rights, the opinion of the Common Law Court (where equity thought fit to take that opinion) was for guidance only,—and the verdict also of a common law jury (where equity thought fit to obtain such verdict) was for guidance only (*e*).

(*a*) *Orr* v. *Diaper*, 4 Ch. D. 92.
(*b*) *Phipps* v. *Stewart*, 1 Atk. 285.
(*c*) *Batten* v. *Gedye*, 41 Ch. D. 507.
(*d*) *Rigby* v. *Great Western R. C.*, 2 Phil. 44.
(*e*) *Legate* v. *Sewell*, 1 P. Wms. 86.

Section I. *On Discovery.*

(1) Discovery.

A bill of discovery was a bill which asked for (or, as the phrase was, "*prayed*" for) discovery simply, and for no relief,—the discovery most usually asked for having been of title-deeds in the custody (or possession) of the defendant, or of facts resting in the knowledge of the defendant,—the object of the discovery having been the better prosecution of some action at law (*f*).

There were numerous defences to a bill of discovery,—For example, the heir general (or heir-at-law) could not have had discovery during the life of his ancestor; but the heir-in-tail might,—within due limits (*g*),—have had discovery: Also, if the proposed action at law was clearly not maintainable, the discovery would have been refused (*h*),—although, if the point was fairly open to doubt, the discovery would have been granted (*i*). Also, if the action was not purely civil,—or if the effect of it would (or might) have been a confiscation of the defendant's property (*k*),—no discovery would have been granted. Also, where the defendant was a mere witness, there was no need for (or right to) the discovery. Also, equity would not have granted discovery in aid of a voluntary arbitration (*l*),—but would (*semble*) have done so in aid of a compulsory arbitration (*m*). But (since the fusion of law and equity) it has not been open to a defendant to object (*n*),—although it was formerly always open to him to have objected (*o*),—by way of defence to the discovery, that he was a *bonâ fide* purchaser for value without notice of the plaintiff's claim.

(*f*) *Angell* v. *Angell*, 1 Sim. & Stu. 83.
(*g*) *Shaftesbury* v. *Arrowsmith*, 4 Ves. 66.
(*h*) *Lord Kensington* v. *Mansell*, 13 Ves. 240.
(*i*) *Thomas* v. *Tyler*, 3 Younge & Col. Ex. 255.
(*k*) *United States of America* v. *M'Rae*, L. R. 3 Ch. App. 79.
(*l*) *Street* v. *Rigby*, 6 Ves. 821.
(*m*) *British Emp. Shipping Co.* v. *Somes*, 3 K. & J. 333.
(*n*) *Emmerson* v. *Ind*, 12 App. Ca. 300.
(*o*) *Stanhope* v. *Earl Verney*, 2 Eden, 81.

Section Ia. *On Bills to Perpetuate Testimony,—And to Take Evidence* De Bene Esse.

(a) Bills to perpetuate testimony,—object of; also, cases for.

(1) *Bills to Perpetuate Testimony* were a branch of the law of discovery,—their object being to *preserve* (that is, *perpetuate*) evidence that was in danger of being lost, before the matter to which it related could be made the subject of judicial investigation: Therefore, this remedy did not lie, where the matter could have been *at once* decided: And it was considered also, that the remedy was not one to be encouraged,—and that it should be permitted only when absolutely necessary to prevent a failure of justice (*p*), or when the preservation of the evidence tended to prevent future litigation (*q*).

Equity would not have perpetuated evidence of a right which might be barred;

The Court, formerly, declined to entertain a bill to perpetuate testimony in support of a right which might have been barred,—as in the case of a remainderman filing a bill against the tenant-in-tail in possession (*r*): Also, a mere expectancy was not considered sufficient,—as (*e.g.*) the "*bare expectation of a future interest*" resulting, *e.g.*, from a married man becoming a widower and re-marrying (*s*); but a contingent legatee had something more than a mere expectancy (*t*): And, *now*, by the 5 & 6 Vict. c. 69,

Secus, now,—under 5 & 6 Vict. c. 69;

—or (speaking more correctly) under Order XXXVII. Rule 35,—where any person would (under the circumstances alleged by him to exist) become entitled, *upon the happening of any future event*, to any honour title dignity or office (*u*),—or to any estate or interest in any property (real or personal),—the right or claim to which cannot be brought to trial before the *happening of such event*, he may file his bill (*i.e.*, commence his action) to perpetuate the testimony (*x*).

or under the Legitimacy Declaration Act, 1858.

Also, a bill to perpetuate testimony was not formerly allowed, where a mere question of *personal status* was in-

(*p*) *Llanover* v. *Homfray*, 13 Ch. Div. 380.
(*q*) *Earl Spencer* v. *Peck*, L. R. 3 Eq. 415.
(*r*) *Dursley* v. *Fitzhardinge*, 6 Ves. 251.
(*s*) *Davis* v. *Angell*, 4 De G. F. & J. 524.
(*t*) *Studholme* v. *Hodgson*, 3 P. Wms. 300.
(*u*) *West* v. *Sackville*, 1903, 2 Ch. 378; also *Sackville-West* v. *Att.-Gen.*, 1910, P. 143.
(*x*) *Bute* (*Marquess*) v. *James*, 33 Ch. Div. 157.

volved (*y*): But, *now*, under the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), the Probate and Divorce Division is empowered to make decrees declaratory of the legitimacy or illegitimacy of the petitioners,—or of the validity or invalidity of the marriages of their parents or grandparents, or of their own marriages (*z*).

(2) *Bills to take Evidence De Bene Esse* were (or included) bills to take the testimony of persons resident abroad, and also of aged and infirm persons resident within the jurisdiction: They were brought by persons already in litigation,—and in the absence of some pending litigation they were not competent at all (*a*): For example, where certain customary tenants claimed (as against the Lord of the Manor), that they were entitled to the mines and minerals within and under their customary tenements,—and the lord disputed their right,—and they commenced (in 1815) their action against the lord (*Moggridge* v. *Hall*); and the evidence of some twelve aged witnesses on behalf of the tenants (and in support of the right which they claimed) was taken *de bene esse* under an order made in that action; and the evidence so taken was filed; and afterwards (in 1871), the customary tenants commenced against the lord a further action of *Phillips* v. *Llanover* (*b*),—by way of supplement to the former action (all the parties to which, and also all the twelve witnesses in which, had meanwhile died),—and the lord had shortly before (in 1870—1) commenced his action against them (*Llanover* v. *Homfray* (*b*)), to establish his exclusive title to the mines and minerals in question,—The Court held the evidence in *Moggridge* v. *Hall* admissible,—and admitted it,—and decided in favour of the claim of the customary tenants, and against the right of the lord: And, *nota bene*, the principle there acted upon was merely the principle (which is of general application), that if (in a dispute respecting lands) any fact comes distinctly in issue, the

(b) Bills to take testimony *De Bene Esse*, —object of; also, cases for;

Also, example of.

(*y*) *Townshend Peerage case*, 10 Cl. & Fin. 289.
(*z*) *Frederick* v. *Att.-Gen.*, L. R. 3 P. & M. 196, 270.
(*a*) *Angell* v. *Angell*, 1 S. & S. 83.
(*b*) 13 Ch. D. 380; 19 Ch. D. 224.

evidence given as to that fact is admissible, to prove the same fact, in another action between the same parties *or between their respective privies,*—and that even although the later action concerns other lands (*c*).

And note, that the modern practice in this class of action is regulated by Order XXXVII. r. 5.

Section II. *On Bills* Quia Timet,—*And Bills of Peace.*

Bills *Quia Timet*,—object of; also, cases for.

(1) *Bills Quia Timet* were in the nature of suits of prevention or of precaution,—the plaintiff seeking the aid of the Court, because he feared (*quia timet*) some future probable injury to his rights or interests, and not because any injury had already happened: And the nature of the relief asked for and given was dependent on circumstances,—The Court sometimes appointing a receiver of the rents or other income (*d*), or of the cargo of a ship (*e*), or of goods and chattels generally; and sometimes ordering a pecuniary fund to be paid into Court(*f*), or otherwise providing (*e.g.*) some indemnity to a trustee against his proximate liability (*g*); and the Court would sometimes merely grant a protective injunction(*h*): And, *nota bene*, since the Judicature Acts, an action in the nature of a bill *quia timet* may still be brought (*i*): But the action does not lie, merely to enforce (*e.g.*) the right of a lessee to be indemnified by his assignee against the future accruing liabilities under the lease (*i*),—but only against liabilities already accrued (*k*): Nor, generally will the action lie, unless the plaintiff is able to prove danger of a *substantial* kind, and which is either imminent (*l*) or inevitable (*m*),—or else can show some *contract* entitling him to the relief (*n*).

(*c*) *Doe* v. *Foster*, 1 A. & E. 791.
(*d*) *Leney* v. *Callingham*, 1908, 1 K. B. 79.
(*e*) *Dreyfus* v. *Peruvian Guano*, 42 Ch. D. 66.
(*f*) *Brice* v. *Carroll*, 1902, 2 Ch. 175.
(*g*) *Hobbs* v. *Wayet*, 36 Ch. D. 256.
(*h*) *Wooldridge* v. *Norris*, L. R. 6 Eq. 410.
(*i*) *Harris* v. *Boots*, 1904, 2 Ch. 376.
(*k*) *Lloyd* v. *Dimmack*, 7 Ch. D. 398.
(*l*) *Fletcher* v. *Bealey*, 28 Ch. Div. 688.
(*m*) *Pattisson* v. *Gilford*, L. R. 18 Eq. 259.
(*n*) *Siddons* v. *Short*, 2 C. P. D. 572.

(2) Bills of Peace bore some resemblance to Bills *quia timet:* But a bill of peace (properly so called) was a bill brought by a person to establish and perpetuate a right claimed by him, which (from its very nature) might be controverted in different successive actions,—and greatly to his vexation,—and justice required, that he should be quieted in his right, once that right had been sufficiently declared,—*Interest reipublicæ ut sit finis litium:* Therefore, where (*e.g.*) there was one general right to be established against a great number of persons,—or where (*e.g.*) one person claimed or defended a right against many, or many claimed or defended a right against one, —The Court would first of all declare the right,—and would thereafter (in order to prevent any recurrence of the suit) make a decree binding on all,—for example, in actions by lords against their tenants, to establish their right to fines, or to the profits of fairs, or to a sole and several fishery (*o*). But, wherever the plaintiff had definitively established his right, and still was in danger of further litigation relative to it (*p*), a perpetual injunction would have been granted,—*Scil.*, because the litigation, after a time, became vexatious: And all vexatious litigation will be suppressed (*q*); and the 59 & 60 Vict. c. 51, now specifically provides for its suppression.

Bills of peace, —object of; also, cases for.

Bills of peace, instances of.

Section III. *On the Cancelling, and Delivery up, of Documents.*

The jurisdiction of equity to direct the cancellation and the delivery up of documents, was also of a protective character (*r*),—the jurisdiction being largely discretionary, however: Thus, voluntary agreements (although not enforceable) would not ordinarily have been set aside, —*Scil.*, because if a man would bind himself in a voluntary deed (and without any power of revocation), equity would, ordinarily, leave him bound thereby (*s*): Therefore, where a man (who was a sot) signed a very foolish sale-

Instrument, decree for delivery up of,—not a matter of right; but of judicial discretion in the Court.

(*o*) *Mayor of York* v. *Pilkington*, 1 Atk. 282.
(*p*) *Bath* (*Earl*) v. *Sherwin*, Prec. Ch. 261.
(*q*) *Grepe* v. *Loam*, 37 Ch. D. 168.
(*r*) *Williams* v. *Bull*, 32 Beav. 574.
(*s*) *Hall* v. *Hall*, L. R. 8 Ch. App. 430.

contract, and asked to be relieved from it (as being only *a little scrap of paper at an ale-house*), the Court did not relieve him (*t*). But if a contract was *voidable* for actual fraud (or for constructive fraud),—and, sometimes, even where the plaintiff had participated in the fraud,—the plaintiff would have been relieved; and the Court would also,—ordinarily at least, but not invariably,—have set aside a contract which was voidable for oppression or undue influence (*u*),—or for illegality (*x*).

I. *Voidable instruments*,—
(a) When cancelled.
(b) When not cancelled.

II. *Void instruments*,

(a) When delivered up, and upon what grounds.

As regards instruments which were utterly *void*,—There was at one time some doubt, whether the remedy obtainable in a Court of law was not sufficient: But the jurisdiction of equity was, eventually, fully established, —*Scil.*, in all cases where the delivery up of the document would help to prevent the perpetration of some future wrong (*y*): Also, if the document was of such turpitude, that it ought not to be used for any purpose, it was against conscience for the party holding it to retain it; and if the document was, *e.g.*, a negotiable instrument, it was in danger of being used for a fraudulent purpose; and if it was a title deed, its existence (in an uncancelled state) threw a cloud upon the title (*z*).

(b) When not delivered up, and upon what grounds.

Occasionally, however, the proper remedy was not to have the document cancelled, but to have the evidence which supported the defence to it perpetuated: And where the illegality of the instrument appeared upon the face of it, there was no danger even, that the lapse of time would prejudice the defendant in his defence: Also, it is never wise to jump before you come to the stile,—so that if C. D. has never shown any intention of suing you, and you rather think he never will, why should you sue him *in an access of timidity* (*a*)?

(*t*) *Villers* v. *Beaumont*, 1 Vern. 100.
(*u*) *St. John* v. *St. John*, 11 Ves. 535.
(*x*) *Barclay* v. *Pearson*, 1893, 2 Ch. 154.
(*y*) *Jones* v. *Merioneth Building Society*, 1891, 2 Ch. 587.
(*z*) *Kemp* v. *Prior*, 7 Ves. 248.
(*a*) *The Leeds Forge case*, 1906, 2 Ch. 498.

Section IV. *On Bills to Establish Wills.*

Equity had no general jurisdiction over wills,—the proper Court having been (as regards personalty) the Ecclesiastical Court,—and latterly the Court of Probate (its successor); and (as regards realty) the Court of Common Pleas or of the Queen's Bench,—and latterly (upon citation of the heir and devisee) the Court of Probate: But, where a will came incidentally into question in equity, that Court necessarily acquired *some jurisdiction* regarding the will,—And (in such a case) if the validity of the will was admitted (or had already been established elsewhere), equity acted upon it to the fullest extent: And if not, then equity established the will, —either directing (for this purpose) an issue *devisavit vel non;* or else trying that issue itself,—*Scil.*, by calling the attesting witnesses (that is to say, *per testes*) or sending it for trial at the assizes.

Equity dealt with wills incidentally.

Occasionally, also, the very object of the suit in equity might have been to establish the will: For example, where the will was a will of real estate, and it was desired to obtain a perpetual injunction against the heir-at-law, equity assumed jurisdiction,—Because the devisee (being in possession) could not litigate the will at law (*Scil.*, in an action of *ejectment*), and yet was entitled to say to the heir-at-law, "*Litigate now or never*" (*b*): And where equity so established the will,—or where equity decreed that the trusts of the will should be executed (*c*), —that was a final decision upon the validity of the will. But a purchaser from the devisee could not have required the devisee to so establish the will (*d*).

Devisee might come into equity to establish a will against heir-at-law.

The facilities for proving a will in the Probate Division are now very great: That is to say,—Firstly, if the will has the usual attestation clause, it is proved by the simple oath of the executor (that he believes the will to be the true last will); and, Secondly, if the will has not that

Proof of will in Court of Probate,— effect of,—

(*b*) *Boyse* v. *Rossborough*, 6 H. L. Ca. 1.
(*c*) *Gooch* v. *Gooch*, 3 De G. M. & G. 366, on p. 386.
(*d*) *Colton* v. *Wilson*, 3 P. Wms. 190; *Morrison* v. *Arnold*, 19 Ves. 669; *Grove* v. *Bastard*, 1 De G. M. & G. 12; *Grove* v. *Young*, 5 De G. & Sm. 38.

attestation clause, then (in addition to the executor's oath to the effect aforesaid) there is required also, from one of the subscribing witnesses, an affidavit of due execution by the testator: Probate so obtained is called probate in common form,—probate in solemn form being where both the attesting witnesses are sworn and examined, and other corroborative evidence is taken,—in the presence of the widow and next of kin (including the heir): And when the will has once been proved in such solemn form, the probate is conclusive proof of the will (*e*),—even where the heir may only have been cited as one of the next of kin (*f*).

(a) When will is proved in solemn form.

(b) When will is proved in common form.

Where,—as is most frequently the case,—the probate has been in common form, and in some subsequent action affecting the real estate, it becomes necessary to establish the devise,—The plaintiff gives to the defendant,—ten days at least before the trial,—notice, that he intends using at the trial the probate (or an office copy thereof); and thereupon such probate (or office copy) becomes sufficient evidence,—Unless the defendant (within four days after receiving the notice) gives a counter-notice to the effect that he disputes the devise (*g*),—In which latter case, it becomes necessary to prove the will as a substantive independent fact, and in accordance with the ordinary rules of evidence.

Probate Division,—exclusive jurisdiction of.

The Probate Division may also, in a proper case, make an order for the revocation of a probate (*h*),—and even for the revocation of a revocation of the probate (*i*); and it is not proper, to come into Chancery for such a purpose (*k*): And, in fact, all objections to wills (or to parts of wills), on the ground of fraud, must now be taken in the Probate Division (*l*): But the jurisdiction of the Chancery Division, as regards relieving against accidents and mistakes in wills (*m*), and as to all questions

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(*e*) 20 & 21 Vict. c. 77, s. 62.
(*f*) *Beardsley* v. *Beardsley*, 1899, 1 Q. B. 746.
(*g*) 20 & 21 Vict. c. 77, s. 64.
(*h*) *Rhodes* v. *Rhodes*, 7 App. Ca. 192.
(*i*) *Birch* v. *Birch*, 1902, P. 130.
(*k*) *Meluish* v. *Milton*, 3 Ch. D. 27.
(*l*) *Morrell* v. *Morrell*, 7 P. D. 68.
(*m*) *Salt* v. *Pym*, 28 Ch. Div. 153.

relative to the true construction of the will (*n*), remains intact: The Probate Division used to have no jurisdiction, where the will did not deal at all with the personal estate, and did not even appoint an executor,—but dealt only with the real estate (*o*); and even under the Judicature Acts, the Probate Division did not acquire any jurisdiction in the matter of wills purely of real estate (*p*): But, under the Land Transfer Act, 1897 (*q*), the Probate Division has now jurisdiction (for all the purposes of that Act),—even as regards wills which deal only with real estate (*r*).

Wills, which dealt with real estate only,—probate of.

SECTION V. *On the Writ* "Ne exeat regno."

The writ of *ne exeat regno* was a prerogative writ,—and was originally applicable only on great political occasions (*Scil.*, for the safety and benefit of the realm); and such having been the character of the writ in its origin, it was afterwards applied with great caution and jealousy, when a private subject invoked its aid in favour of his private rights (*s*):

General jurisdiction in equity,—

In cases of equitable debts,—and of equitable debts only.

That is to say,—A Court of Equity, where it granted the writ (*Scil.*, in respect of an *equitable* debt), strictly followed the rules which were applicable in a Court of law to the issue of the corresponding writ of *capias* (*Scil.*, in respect of a *legal* debt (*t*)): Therefore, in a Court of Equity, it was required, that the equitable demand should have been certain and not contingent (*u*): And it was further required, that the amount demanded in the action should have already become actually due and payable (*v*).

The old *ne exeat* jurisdiction in equity appears to still remain,—although it has been to a large extent modified by the successive modern statutes, which have to a certain extent abolished imprisonment for debt on mesne process (*x*).

(*n*) *Wagstaff* v. *Jalland*, 1908, 1 Ch. 162.
(*o*) *Bradford* v. *Young*, 26 Ch. D. 656.
(*p*) *Re Cubbon*, 11 Prob. Div. 169.
(*q*) 60 & 61 Vict. c. 65.
(*r*) *Re Barnett*, 1898, P. 145.
(*s*) *Flack* v. *Holm*, 1 J. & W. 405.
(*t*) *Drover* v. *Beyer*, 13 Ch. D. 242.
(*u*) *Sobey* v. *Sobey*, L. R. 15 Eq. 200.
(*v*) *Colverson* v. *Bloomfield*, 29 Ch. D. 341.
(*x*) 32 & 33 Vict. c. 62, s. 6, modifying 1 & 2 Vict. c. 110, s. 3.

Ne exeat,—under divers statutes.

The writ has also been made specifically available, in certain cases, by statute: For example, under the Absconding Debtors Act, 1870 (*y*), the writ may issue, where the debtor is going abroad after the issue of a debtor summons against him (*z*): And, under the Bankruptcy Act, 1883 (*a*), s. 25, the debtor may be arrested, if he is about to abscond after a bankruptcy notice has been issued (or a bankruptcy petition presented) against him: And, generally, under the Debtors Act, 1869 (*b*), ss. 4, 6, the debtor (even an executor-debtor (*c*)) may be arrested (by way of bail to the action), whenever the debt is £50 or more,—assuming always that the defendant is about to leave the country (on purpose to hamper the plaintiff in his action), and assuming also that the debt demanded in the action is certain and not contingent, and is a debt presently payable (*d*). But the Court still, of course, exercises a great discretion in issuing the writ (*e*),—even in cases where the writ is (and continues) available:

Companies Act, 1908, —arrest (or seizure) under.

Also, under the Companies Act, 1908 (*f*), s. 176, on proof (of probable cause for believing) that a contributory (in a winding-up) is about to quit England, or otherwise to abscond,—or is about to remove (or to conceal) any of his property, for the purpose either (1) of evading payment of calls, or (2) of avoiding examination respecting the affairs of the company,—The Court may cause the contributory to be arrested (*Scil.*, in a proper case (*g*)); and may also (either in lieu of or in addition to arresting him) cause his books and papers and his moveable *personal* property (but not his *real* estates) to be seized,—the period during which the arrest or the seizure is to continue being in the discretion of the Court.

(*y*) 33 & 34 Vict. c. 76.
(*z*) *Lees* v. *Patterson*, 7 Ch. D. 866.
(*a*) 46 & 47 Vict. c. 52.
(*b*) 32 & 33 Vict. c. 62; and see also Ord. LXIX. rr. 1—7.
(*c*) *Davey* v. *Bourne*, 1906, 1 Ch. 697.
(*d*) *Colverson* v. *Bloomfield*, *supra*.
(*e*) *In re Woodward*, 30 Sol. Journ. 753.
(*f*) 8 Edw. VII. c. 69.
(*g*) *In re Imperial Mercantile Credit Co.*, L. R. 5 Eq. 264.

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